

# EXHIBIT A

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

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SECURITIES INVESTOR PROTECTION  
CORPORATION,

Plaintiff,

vs.

Case No. 08-01789

BERNARD L. MADOFF INVESTMENT  
SECURITIES LLC,

Defendant.

-----X  
In Re:  
BERNARD L. MADOFF,  
Debtor.

-----X  
IRVING H. PICARD, Trustee for  
the Substantively Consolidated  
SIPA Liquidation of Bernard  
L. Madoff,

Plaintiff,

vs.

Case No. 10-04932

JPMORGAN CHASE & CO., JPMORGAN  
CHASE BANK, N.A., J.P. MORGAN  
SECURITIES LLC and J.P. MORGAN  
SECURITIES LTD.,

Defendant.

-----X  
DEPOSITION OF MARC E. HIRSCHFIELD, ESQ.  
New York, New York  
Tuesday, May 6, 2014  
9:42 a.m.

Reported by:  
Jennifer Ocampo-Guzman, CRR, CLR  
JOB NO. 34178

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2	2 APPEARANCES (Continued):
3	3
4	4 Attorneys for Solus Recovery Fund
5	5 O'MELVENY & MYERS, LLP
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8	8 BY: EMILY R. CHEPIGA, ESQ.
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10	10
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2	2 MARC E. HIRSCHFIELD,
3	3 called as a witness, having been duly sworn,
4	4 was examined and testified as follows:
5	5 EXAMINATION BY
6	6 MR. GREENWALD:
7	7 Q. Good morning.
8	8 A. Good morning.
9	9 Q. Mr. Hirschfield, you are a member
10	10 of Baker & Hostetler?
11	11 A. Yes.
12	12 Q. And your area of practice, if I
13	13 have it correctly, is bankruptcy?
14	14 A. Yes.
15	15 Q. Including bankruptcy litigation?
16	16 A. That's correct.
17	17 Q. And you've practiced in that area
18	18 for over 20 years; is that correct?
19	19 A. About 20 years.
20	20 Q. You have been personally involved
21	21 in litigation on behalf of Irving Picard, in
22	22 his capacity as trustee of the SIPA or the
23	23 SIPA estate of Bernard L. Madoff Investment
24	24 Securities or BLMIS; is that correct?
25	25 A. Yes.

2 (Pages 2 to 5)

<p style="text-align: right;">6</p> <p>1 Hirschfield</p> <p>2 <b>Q. And in that capacity you've been</b></p> <p>3 <b>personally involved in the litigation of</b></p> <p>4 <b>several of actions?</b></p> <p>5 A. Yes.</p> <p>6 <b>Q. To date, you would agree with me</b></p> <p>7 <b>that the trustee has negotiated several</b></p> <p>8 <b>settlements of avoidance actions, correct?</b></p> <p>9 A. Yes.</p> <p>10 <b>Q. Including what is characterized on</b></p> <p>11 <b>its website as 16, "significant recoveries";</b></p> <p>12 <b>do you agree with that?</b></p> <p>13 A. I don't know if the number is 16,</p> <p>14 but certainly a number.</p> <p>15 MR. GREENWALD: Let me show you</p> <p>16 what we will mark as Exhibit 1, which is</p> <p>17 a download or printout dated April 22,</p> <p>18 2014 of a page from the</p> <p>19 Madofftrustee.com website, specifically</p> <p>20 the --</p> <p>21 (Exhibit 1, Document entitled, "The</p> <p>22 Madoff Recovery Initiative," marked for</p> <p>23 identification, this date.)</p> <p>24 MR. LEVIN: Excuse me. We have</p> <p>25 exhibits marked on the documents</p>	<p style="text-align: right;">8</p> <p>1 Hirschfield</p> <p>2 Optimal.</p> <p>3 <b>Q. Were you personally involved in the</b></p> <p>4 <b>negotiation of the JPMorgan Chase settlement?</b></p> <p>5 A. No.</p> <p>6 <b>Q. Did you, in your Baker Hostetler</b></p> <p>7 <b>diaries, ever record any time in connection</b></p> <p>8 <b>with the settlement of that matter, prior to</b></p> <p>9 <b>its settlement?</b></p> <p>10 A. I don't believe so.</p> <p>11 <b>Q. Who at Baker Hostetler were most</b></p> <p>12 <b>personally and directly involved in the</b></p> <p>13 <b>negotiation of the JPMorgan settlement?</b></p> <p>14 A. I believe Mr. Sheehan and Ms.</p> <p>15 Brown.</p> <p>16 MR. GREENWALD: Are you free for a</p> <p>17 deposition later?</p> <p>18 MR. SHEEHAN: No.</p> <p>19 <b>Q. Now, other than the 16 identified</b></p> <p>20 <b>significant recoveries, have there been any</b></p> <p>21 <b>settlements of avoidance actions in which the</b></p> <p>22 <b>total consideration paid by the defendant has</b></p> <p>23 <b>exceeded \$40 million?</b></p> <p>24 A. Other than these?</p> <p>25 <b>Q. Other than these.</b></p>
<p style="text-align: right;">7</p> <p>1 Hirschfield</p> <p>2 already. Should we use a different</p> <p>3 numbering sequence here?</p> <p>4 MR. GREENWALD: No, let's just use</p> <p>5 this.</p> <p>6 Let me go back.</p> <p>7 I'm handing you what's been marked</p> <p>8 as Exhibit 1, which is a page from the</p> <p>9 April 22nd, 2014 version of the</p> <p>10 Madofftrustee.com website, specifically</p> <p>11 the page bearing the term</p> <p>12 "Recoveries-25.html."</p> <p>13 Do you have that?</p> <p>14 A. Yes.</p> <p>15 <b>Q. And you will agree with me -- feel</b></p> <p>16 <b>free to count -- that it identifies 16</b></p> <p>17 <b>"significant recoveries to date"?</b></p> <p>18 A. Yes.</p> <p>19 <b>Q. In which of the 16 that are listed</b></p> <p>20 <b>have you personally participated in the</b></p> <p>21 <b>underlying settlement negotiations?</b></p> <p>22 A. Five.</p> <p>23 <b>Q. Please identify the five.</b></p> <p>24 A. Tremont. It's on page 2. Carl</p> <p>25 Shapiro, Jeffry Picower, Norman Levy and</p>	<p style="text-align: right;">9</p> <p>1 <b>Hirschfield</b></p> <p>2 A. Let me look at them.</p> <p>3 I can't think of any now.</p> <p>4 MR. GREENWALD: David, are you</p> <p>5 aware of any?</p> <p>6 MR. SHEEHAN: I don't remember. I</p> <p>7 would have to look. Too many numbers</p> <p>8 and too many notes.</p> <p>9 MR. GREENWALD: All right.</p> <p>10 <b>Q. Would you agree with me though,</b></p> <p>11 <b>Mr. Hirschfeld, that the only settlement for</b></p> <p>12 <b>which Optimal has invoked the equal treatment</b></p> <p>13 <b>provision to date has been the JPMorgan Chase</b></p> <p>14 <b>settlement?</b></p> <p>15 A. No.</p> <p>16 MR. SHEEHAN: I will supply you.</p> <p>17 We will look -- shall we make that</p> <p>18 representation on the record? -- we will</p> <p>19 look for any, besides the ones that are</p> <p>20 listed here, and if they are in excess</p> <p>21 of 40, we will let you know.</p> <p>22 That is all counsel, of course.</p> <p>23 MR. GREENWALD: Thank you.</p> <p>24 MR. SHEEHAN: Sure.</p> <p>25 <b>Q. In what other the settlements has</b></p>

<p style="text-align: right;">10</p> <p>1           <b>Hirschfield</b></p> <p>2   <b>Optimal invoked the equal treatment</b></p> <p>3   <b>provision?</b></p> <p>4       A. In connection with the Hadassah</p> <p>5   settlement, Mr. Levin had contacted us and</p> <p>6   said he was considering it. He ultimately</p> <p>7   decided not to, because he felt it was a</p> <p>8   similar -- not similar to Optimal, so he</p> <p>9   didn't actually invoke it, but certainly he</p> <p>10   began down the road of trying to evoke it</p> <p>11   before deciding not to.</p> <p>12       <b>Q. So I understand your question,</b></p> <p>13   <b>Optimal in fact did not invoke the equal</b></p> <p>14   <b>treatment provision with respect to Hadassah?</b></p> <p>15       A. Yes, he did not actually invoke it,</p> <p>16   but there were discussions.</p> <p>17       <b>Q. There were preliminary discussions</b></p> <p>18   <b>between yourself and Mr. Levin concerning</b></p> <p>19   <b>whether the Hadassah settlement was an</b></p> <p>20   <b>appropriate settlement for invocation of the</b></p> <p>21   <b>provision?</b></p> <p>22       A. Correct, discussions with me and</p> <p>23   perhaps others.</p> <p>24       <b>Q. When did those, approximately when</b></p> <p>25   <b>did those discussions take place?</b></p>	<p style="text-align: right;">12</p> <p>1           <b>Hirschfield</b></p> <p>2       A. I don't know why Mr. Levin</p> <p>3   ultimately chose not to.</p> <p>4       <b>Q. During your discussions with Mr.</b></p> <p>5   <b>Levin, did you discuss the circumstance that</b></p> <p>6   <b>Hadassah, at least according to the financial</b></p> <p>7   <b>information that you provided to him, had</b></p> <p>8   <b>been unable to pay a significantly greater</b></p> <p>9   <b>settlement?</b></p> <p>10       A. Yes.</p> <p>11       <b>Q. And ability to pay is one of the</b></p> <p>12   <b>similarity factors identified in the Optimal</b></p> <p>13   <b>settlement relevant to application of the</b></p> <p>14   <b>equal treatment provision?</b></p> <p>15       A. Yes.</p> <p>16       <b>Q. In the course of your and Mr.</b></p> <p>17   <b>Levin's discussions about Hadassah's</b></p> <p>18   <b>settlement, did Mr. Levin express a view as</b></p> <p>19   <b>to the application of the other factors,</b></p> <p>20   <b>other similarity factors to the Hadassah</b></p> <p>21   <b>settlement?</b></p> <p>22       A. I don't recall.</p> <p>23       <b>Q. So if we can just summarize your</b></p> <p>24   <b>testimony, the only settlement with respect</b></p> <p>25   <b>to which Optimal has invoked the equal</b></p>
<p style="text-align: right;">11</p> <p>1           <b>Hirschfield</b></p> <p>2       A. I know it was in March, but I</p> <p>3   forget what year it was.</p> <p>4       <b>Q. And could you describe to me as</b></p> <p>5   <b>best you can the course of those discussions,</b></p> <p>6   <b>what did Mr. Levin say, what did you say,</b></p> <p>7   <b>obviously paraphrasing and summarizing as</b></p> <p>8   <b>appropriate?</b></p> <p>9       A. Sure. Mr. Levin contacted me while</p> <p>10   I was on vacation, sent me an e-mail, I</p> <p>11   believe, and asked about the terms of</p> <p>12   settlement. When I got back from vacation, I</p> <p>13   believe we spoke. He asked why it is the MFN</p> <p>14   found clause would or would not apply. I</p> <p>15   think ultimately there was a meeting, I think</p> <p>16   it was at Morrison &amp; Foerster's offices, I</p> <p>17   think it was Morrison &amp; Foerster, where we</p> <p>18   went through the financials of Hadassah and</p> <p>19   their ability to pay. I think ultimately</p> <p>20   they provided to Mr. Levin information, and</p> <p>21   ultimately they didn't apply it.</p> <p>22       <b>Q. And are you aware of why Optimal</b></p> <p>23   <b>did not ultimately decide to invoke the equal</b></p> <p>24   <b>treatment provision with respect to the</b></p> <p>25   <b>Hadassah settlement?</b></p>	<p style="text-align: right;">13</p> <p>1           <b>Hirschfield</b></p> <p>2   <b>treatment provision, to date, has been the</b></p> <p>3   <b>JPMorgan Chase settlement?</b></p> <p>4       A. Yes.</p> <p>5       <b>Q. Now going back to early 2009,</b></p> <p>6   <b>before suing avoidance action defendants, is</b></p> <p>7   <b>it not the case that the trustee has sent out</b></p> <p>8   <b>letters demanding the return of funds</b></p> <p>9   <b>transferred to the defendant, either</b></p> <p>10   <b>initially or subsequently, by the, by BLMIS?</b></p> <p>11       A. I was not at Baker Hostetler in</p> <p>12   early 2009.</p> <p>13       <b>Q. Are you aware, though, of the</b></p> <p>14   <b>trustee's practice in early 2009 of sending</b></p> <p>15   <b>out letters demanding return of transferred</b></p> <p>16   <b>funds?</b></p> <p>17       A. I believe he may have sent some. I</p> <p>18   do not know to what that extent.</p> <p>19       <b>Q. Now, as a lawyer representing</b></p> <p>20   <b>Mr. Picard, I take it you have participated</b></p> <p>21   <b>in the drafting and filing of several</b></p> <p>22   <b>avoidance actions?</b></p> <p>23       A. Yes.</p> <p>24       <b>Q. Approximately how many?</b></p> <p>25       A. Probably, I mean probably close to</p>

14	16
1 Hirschfield	1 Hirschfield
2 a thousand. There were -- that I	2 I mean I can get the rule for you
3 participated to some extent.	3 to read.
4 Q. And unlike an ordinary civil	4 MR. SHEEHAN: Are you asking him to
5 litigant, the trustee as a SIPA trustee	5 agree with what the rule says?
6 enjoys powers under bankruptcy Rule 2004 to	6 MR. GREENWALD: Yes, I'm asking him
7 conduct pre-complaint investigations; isn't	7 to agree with what the rule says.
8 that correct?	8 A. And the rule says what it says.
9 A. You said unlike?	9 Q. Now, in your experience with Baker
10 Q. Unlike a typical civil litigant,	10 & Hostetler representing Mr. Picard, when
11 there is no provision in the Federal Rules of	11 Mr. Picard, through Baker Hostetler, had made
12 Civil Procedure for pre-complaint discovery.	12 allegations in a complaint following the
13 That's a fair statement, correct?	13 conduct of a Rule 2004 examination, you would
14 A. Correct.	14 agree that those allegations are based upon
15 Q. By contrast, bankruptcy Rule 2004	15 evidence that the trustee has either
16 does authorize and empower the trustee in a	16 developed through a 2004 examination or from
17 bankruptcy matter or SIPA matter to conduct	17 some other source?
18 pre-complaint investigations?	18 A. Yes.
19 A. That's correct.	19 Q. And as far as you're aware, the
20 Q. And before the -- so before a SIPA	20 trustee has complied with bankruptcy
21 trustee files a complaint, he has the ability	21 Rule 9011 in every complaint he has filed?
22 to subpoena prospective defendants for	22 A. Yes.
23 documents?	23 Q. And accordingly, so far as you are
24 A. Yes.	24 aware, assuming I've quoted the rule
25 Q. And he has the power to conduct	25 correctly, there is "evidentiary support" for
15	17
1 Hirschfield	1 Hirschfield
2 examinations under oath?	2 facts the trustee has alleged in the
3 A. Yes.	3 complaint he has filed?
4 Q. And in this matter, by which I mean	4 A. Yes.
5 the Madoff liquidation, the SIPA liquidation,	5 Q. Were you involved in any capacity
6 the trustee has exercised its power under	6 in the preparation of the complaint in the
7 Rule 2004 to subpoena documents and conduct	7 trustee's avoidance action against JPMorgan?
8 examinations of prospective defendants?	8 A. I may have seen a draft at some
9 A. Yes.	9 point, but I was not actively involved in
10 Q. The trustee has done so in part,	10 putting together or anything of the sort.
11 you would agree, because of his obligation	11 Q. You saw a draft, however, before it
12 under bankruptcy Rule 9011, 9011?	12 was filed?
13 A. For a lot of reasons.	13 A. I may have. I don't recall.
14 Q. Right. And that's one of them?	14 Q. Do you recall whether you reviewed
15 A. Sure.	15 the draft that you may have seen?
16 Q. Compliance with bankruptcy	16 A. I don't recall.
17 Rule 9011 is the one of the reasons the	17 Q. Now, on December 2nd of 2010, the
18 trustee conducts extensive Rule 2004	18 trustee filed its 112-page complaint against
19 discovery examinations, whatever the term is?	19 JPMorgan Chase and certain of its affiliates.
20 A. Yes.	20 We have it here, although I don't
21 Q. And bankruptcy Rule 9011, like	21 know if we need to refer to it. You would
22 Federal Rule of Civil Procedure 11, requires	22 agree with me, it contained 21 claims?
23 the trustee to assert into pleadings only	23 A. I would have to look at it.
24 factual contentions that have "evidentiary	24 Q. Would you agree it contains 16
25 support."	25 avoidance claims seeking recovery of initial

<p>18</p> <p>1 Hirschfield</p> <p>2 transfers by BLMIS and subsequent transfers</p> <p>3 from certain feeder funds?</p> <p>4 A. I don't know.</p> <p>5 MR. GREENWALD: Why don't we pull</p> <p>6 it out and mark the complaint as</p> <p>7 Exhibit 2.</p> <p>8 (Exhibit 2, Complaint, marked for</p> <p>9 identification, this date.)</p> <p>10 <b>Q. You are aware that the filing of</b></p> <p>11 <b>the complaint against JPMorgan Chase came</b></p> <p>12 <b>only after the trustee had conducted a</b></p> <p>13 <b>Rule 2004 examination of JPMorgan?</b></p> <p>14 A. I don't know whether one was</p> <p>15 conducted of JPMorgan or not. I believe</p> <p>16 there might have been one, but I'm not</p> <p>17 positive.</p> <p>18 <b>Q. Well, the complaint in various</b></p> <p>19 <b>parts references examinations of various</b></p> <p>20 <b>JPMorgan employees. I took from that, that a</b></p> <p>21 <b>2004 examination had been conducted.</b></p> <p>22 A. I believe so, but again, I'm not</p> <p>23 positive.</p> <p>24 <b>Q. Do you know how many subpoenas the</b></p> <p>25 <b>trustee issued to JPMorgan as part of its</b></p>	<p>20</p> <p>1 Hirschfield</p> <p>2 <b>Q. Do you know who was most directly</b></p> <p>3 <b>and personally representing JPMorgan, in the</b></p> <p>4 <b>period in 2010 leading up to the filing of</b></p> <p>5 <b>the complaint?</b></p> <p>6 A. I believe it was lawyers at</p> <p>7 Wachtell Lipton. I don't know who it was at</p> <p>8 that firm.</p> <p>9 MR. GREENWALD: I would like to</p> <p>10 mark as an exhibit your declaration in</p> <p>11 this proceeding. Call that Exhibit 3.</p> <p>12 (Exhibit 3, Declaration of Marc E.</p> <p>13 Hirschfield, marked for identification,</p> <p>14 this date.)</p> <p>15 <b>Q. Now, please turn to paragraph 63,</b></p> <p>16 <b>which is on page 23, 24.</b></p> <p>17 <b>You would agree with me that in</b></p> <p>18 <b>this paragraph, you offer six reasons why in</b></p> <p>19 <b>your view the most favored nation provision,</b></p> <p>20 <b>or what I will refer to as the equal</b></p> <p>21 <b>treatment provision, would not apply to the</b></p> <p>22 <b>JPMorgan settlement; is that correct?</b></p> <p>23 A. Yes.</p> <p>24 <b>Q. Now, one of the reasons you cite is</b></p> <p>25 <b>that JPMorgan was not a BLMIS customer; isn't</b></p>
<p>19</p> <p>1 Hirschfield</p> <p>2 pre-complaint investigation?</p> <p>3 A. No.</p> <p>4 <b>Q. Is that information available?</b></p> <p>5 A. I'm sure we have it somewhere,</p> <p>6 yeah.</p> <p>7 MR. GREENWALD: It's not publicly</p> <p>8 available, is it? No.</p> <p>9 <b>Q. Do you know how many examinations</b></p> <p>10 <b>of witnesses the trustee conducted?</b></p> <p>11 A. No.</p> <p>12 <b>Q. Now, would you agree that if</b></p> <p>13 <b>examinations were conducted and if 2004</b></p> <p>14 <b>subpoenas were served and complied with, the</b></p> <p>15 <b>complaint that the trustee filed would</b></p> <p>16 <b>reflect the trustee's review of the results</b></p> <p>17 <b>of his 2004 examination?</b></p> <p>18 A. I would assume that those who</p> <p>19 drafted the complaint relied upon all the</p> <p>20 information available to them.</p> <p>21 <b>Q. Now, before the JPMorgan complaint</b></p> <p>22 <b>was filed, do you know whether the trustee</b></p> <p>23 <b>engaged in any settlement discussions with</b></p> <p>24 <b>JPMorgan?</b></p> <p>25 A. I don't know.</p>	<p>21</p> <p>1 Hirschfield</p> <p>2 <b>that correct, that's the first reason?</b></p> <p>3 A. That's correct.</p> <p>4 <b>Q. So which of the similarity factors</b></p> <p>5 <b>that are identified in the Optimal settlement</b></p> <p>6 <b>is JPMorgan's lack of customer status</b></p> <p>7 <b>relevant?</b></p> <p>8 A. I don't have the provision in front</p> <p>9 of me, but I believe it's a number of them.</p> <p>10 <b>Q. Excuse me?</b></p> <p>11 A. I don't have the actual MFN</p> <p>12 provision in front of me, so I would have to</p> <p>13 look at it, but I believe it's a number of</p> <p>14 them.</p> <p>15 MR. GREENWALD: Okay. Why don't we</p> <p>16 provide it to you.</p> <p>17 Let's mark as Exhibit 4, I guess,</p> <p>18 the Motion For Entry of Order Pursuant</p> <p>19 Section 105, the bankruptcy code, Rules</p> <p>20 2002 and 9019...Approving an Agreement</p> <p>21 By and Among the Trustee and Optimal</p> <p>22 Strategic US Equity Limited and Optimal</p> <p>23 Arbitrage Limited.</p> <p>24 (Exhibit 4, Motion For Entry of</p> <p>25 Order Pursuant Section 105(a) of the</p>

<p style="text-align: right;">22</p> <p>1 Hirschfield</p> <p>2 Bankruptcy Code and Rules 2002 and 9019</p> <p>3 of the Federal Rules of Bankruptcy</p> <p>4 Procedure Approving an Agreement By and</p> <p>5 Among the Trustee and Optimal Strategic</p> <p>6 US Equity Limited and Optimal Arbitrage</p> <p>7 Limited, marked for identification, this</p> <p>8 date.)</p> <p>9 <b>Q. And I will note that the text of</b></p> <p>10 <b>the Optimal settlement appears as an exhibit</b></p> <p>11 <b>to this filing by the trustee.</b></p> <p>12 A. What number is this?</p> <p>13 <b>Q. This will be 4.</b></p> <p>14 <b>So if I'm not mistaken, the list of</b></p> <p>15 <b>the similarity factors appears in section</b></p> <p>16 <b>13(c) of the Optimal settlement, which</b></p> <p>17 <b>appears on page 8 of Exhibit A to this</b></p> <p>18 <b>document.</b></p> <p>19 A. Sure.</p> <p>20 <b>Q. So there the five similarity</b></p> <p>21 <b>factors are listed.</b></p> <p>22 <b>So my question is: To which, if</b></p> <p>23 <b>any, of those five similarity factors is</b></p> <p>24 <b>JPMorgan's lack of customer status relevant?</b></p> <p>25 A. Certainly number 2, the nature of</p>	<p style="text-align: right;">24</p> <p>1 Hirschfield</p> <p>2 <b>Q. So you mentioned two of the five</b></p> <p>3 <b>factors, the second and the fourth. Let's</b></p> <p>4 <b>first focus on the second.</b></p> <p>5 <b>The second similarity factor is,</b></p> <p>6 <b>"The nature of the avoiding power claims</b></p> <p>7 <b>(such as whether they are for recovery of a</b></p> <p>8 <b>preference or for recovery of principal or</b></p> <p>9 <b>fictitious profits)."</b></p> <p>10 <b>So in what way is JPM's lack of</b></p> <p>11 <b>status as a former BLMIS customer relevant to</b></p> <p>12 <b>the evaluation of that factor?</b></p> <p>13 A. The intent of the MFN clause was to</p> <p>14 deal with similar claims. The claims that we</p> <p>15 had against JPMorgan my understanding is were</p> <p>16 different in that they were not a customer,</p> <p>17 and therefore the nature of the claims are</p> <p>18 different. It's not just fictitious profits</p> <p>19 or preferences or that nature.</p> <p>20 <b>Q. But are any of the claims that,</b></p> <p>21 <b>avoidance claims that the trustee asserted</b></p> <p>22 <b>against JPMorgan claims which, by their</b></p> <p>23 <b>nature, can be asserted only against an</b></p> <p>24 <b>entity that is not a customer of a debtor?</b></p> <p>25 A. The avoidance claims are avoidance</p>
<p style="text-align: right;">23</p> <p>1 Hirschfield</p> <p>2 avoiding power claims; and also probably</p> <p>3 number 4.</p> <p>4 I would also note that the</p> <p>5 provision, paragraph 13, is equal</p> <p>6 treatment -- is entitled, "Equal Treatment</p> <p>7 For SUS in Arbitrage With Other Similar</p> <p>8 Customers."</p> <p>9 <b>Q. That's a heading?</b></p> <p>10 A. Yes.</p> <p>11 <b>Q. And I would like to direct your</b></p> <p>12 <b>attention to paragraph 24 of the settlement,</b></p> <p>13 <b>whose heading is "Captions and Rules of</b></p> <p>14 <b>Construction." Which reads, "The captions in</b></p> <p>15 <b>this agreement are inserted only as a matter</b></p> <p>16 <b>of convenience and for reference and do not</b></p> <p>17 <b>define, limit or describe the scope of this</b></p> <p>18 <b>agreement or the scope or content of any of</b></p> <p>19 <b>its provisions."</b></p> <p>20 A. Yes.</p> <p>21 <b>Q. And you would agree that when --</b></p> <p>22 <b>this first caption, it's referring to the</b></p> <p>23 <b>underlying phrase that appears right after</b></p> <p>24 <b>the number 13 on page 7?</b></p> <p>25 A. Yes.</p>	<p style="text-align: right;">25</p> <p>1 Hirschfield</p> <p>2 claims. Other claims may be brought as well,</p> <p>3 I understand, but the nature of those</p> <p>4 avoidance claims are different.</p> <p>5 <b>Q. Let me understand what you mean by</b></p> <p>6 <b>"different."</b></p> <p>7 <b>The question I have is -- the</b></p> <p>8 <b>question I have is, are any of the statutory</b></p> <p>9 <b>avoiding power claims that the trustee</b></p> <p>10 <b>asserted against JPMorgan -- trustees, excuse</b></p> <p>11 <b>me -- claims that by their legal nature can</b></p> <p>12 <b>be asserted only against an entity that is</b></p> <p>13 <b>not a customer of the debtor?</b></p> <p>14 A. The same sections of the bankruptcy</p> <p>15 code are implicated, but the burden of proof</p> <p>16 and the evidentiary standards are, or could</p> <p>17 be different.</p> <p>18 <b>Q. In what way could they be</b></p> <p>19 <b>different, simply by virtue of the fact that</b></p> <p>20 <b>JPMorgan is not a former customer of BLMIS?</b></p> <p>21 A. There is a defining body of case</p> <p>22 law on Ponzi schemes and claims against</p> <p>23 customers, and the body of law is different,</p> <p>24 or it could be different in non-customer</p> <p>25 kinds of cases. It's more like an ordinary</p>



<p style="text-align: right;">26</p> <p>1 Hirschfield</p> <p>2 avoidance action in any bankruptcy case.</p> <p>3 Whereas, in a Ponzi scheme, avoidance action,</p> <p>4 there is an established body of law which</p> <p>5 deals with what the burden of proof is and</p> <p>6 the things you need to prove.</p> <p>7 <b>Q. Well, try to identify for me one,</b></p> <p>8 <b>at least one avoidance action claim that the</b></p> <p>9 <b>trustee asserted against JPMorgan for which</b></p> <p>10 <b>any relevant burden or legal standard was</b></p> <p>11 <b>different from the burden or legal standard</b></p> <p>12 <b>the trustee would face in an action against a</b></p> <p>13 <b>former customer.</b></p> <p>14 A. I've come to understand that some</p> <p>15 of the avoidance actions being brought</p> <p>16 against JPMorgan deal with loans and their</p> <p>17 payment of loans. And under the bankruptcy</p> <p>18 code, whether or not value was given in</p> <p>19 connection with those transactions is</p> <p>20 different than what we would have to prove</p> <p>21 with respect to a customer.</p> <p>22 <b>Q. Now, you also identified the fourth</b></p> <p>23 <b>factor, "The knowledge of the defendant (a</b></p> <p>24 <b>group of defendants, taken as a whole) or its</b></p> <p>25 <b>or their complicity in the fraud that BLMIS</b></p>	<p style="text-align: right;">28</p> <p>1 Hirschfield</p> <p>2 <b>Q. Right, but would any of the</b></p> <p>3 <b>information that the trustee had about</b></p> <p>4 <b>JPMorgan Chase before it settled have made</b></p> <p>5 <b>litigating the avoidance claims against</b></p> <p>6 <b>JPMorgan Chase more challenging for the</b></p> <p>7 <b>trustee than it would have been had JPMorgan</b></p> <p>8 <b>been a direct customer?</b></p> <p>9 MR. SHEEHAN: Object to form.</p> <p>10 A. I'm sorry, can you repeat that</p> <p>11 again?</p> <p>12 <b>Q. Yes.</b></p> <p>13 <b>What information did the trustee</b></p> <p>14 <b>have before it settled with JPMorgan that</b></p> <p>15 <b>made prevailing on its avoidance claims</b></p> <p>16 <b>against JPMorgan harder than it would have</b></p> <p>17 <b>been, had JPMorgan been a direct customer of</b></p> <p>18 <b>BLMIS?</b></p> <p>19 A. I didn't participate in the</p> <p>20 settlement or the negotiations. I just don't</p> <p>21 know the answer to that.</p> <p>22 <b>Q. So without knowing that information</b></p> <p>23 <b>though, it's impossible for you now to say</b></p> <p>24 <b>which way JPMorgan's lack of customer status</b></p> <p>25 <b>cuts in the evaluation of the equal treatment</b></p>
<p style="text-align: right;">27</p> <p>1 Hirschfield</p> <p>2 <b>perpetrated on its customers."</b></p> <p>3 <b>In what way was JPMorgan's lack of</b></p> <p>4 <b>status as a BLMIS customer relevant to the</b></p> <p>5 <b>evaluation of that fourth similarity factor?</b></p> <p>6 A. I believe a certain number of</p> <p>7 claims that the trustee brought against</p> <p>8 JPMorgan involved its knowledge or lack of</p> <p>9 knowledge of what was happening with BLMIS.</p> <p>10 <b>Q. As a practical litigating matter,</b></p> <p>11 <b>why would the fact that JPMorgan was not a</b></p> <p>12 <b>direct Madoff customer make a below</b></p> <p>13 <b>benchmark, by which I mean below 85 percent</b></p> <p>14 <b>settlement, less appropriate for evaluation</b></p> <p>15 <b>under the equal treatment provision?</b></p> <p>16 MR. SHEEHAN: Object to the form.</p> <p>17 A. The information that we might have</p> <p>18 had in our records might have been different,</p> <p>19 meaning the BLMIS records that we got at the</p> <p>20 premises, things of that nature.</p> <p>21 <b>Q. Well, different in what way?</b></p> <p>22 A. I was not involved with the</p> <p>23 preparation of the complaints, so I couldn't</p> <p>24 speak to that, per se. I'm saying, we have</p> <p>25 different kinds of information, perhaps.</p>	<p style="text-align: right;">29</p> <p>1 Hirschfield</p> <p>2 <b>provision?</b></p> <p>3 A. I think with respect to item 2, I</p> <p>4 think it does cut differently. Item 4, I</p> <p>5 think it could cut differently.</p> <p>6 <b>Q. Why did it cut differently on item</b></p> <p>7 <b>2?</b></p> <p>8 A. Again, because the nature of the</p> <p>9 things we need to prove is different for a</p> <p>10 customer versus a non-customer.</p> <p>11 <b>Q. And in which way is it different</b></p> <p>12 <b>for a customer? Does it make it harder for</b></p> <p>13 <b>the trustee to prevail against JPMorgan or</b></p> <p>14 <b>easier?</b></p> <p>15 A. Harder.</p> <p>16 <b>Q. Harder. Why harder?</b></p> <p>17 A. The way that the Ponzi scheme law</p> <p>18 has evolved in suing a customer, the level of</p> <p>19 proof is different, and it's generally easier</p> <p>20 to prove.</p> <p>21 <b>Q. For a non-customer versus a</b></p> <p>22 <b>customer?</b></p> <p>23 A. Yes.</p> <p>24 <b>Q. Why, in the case of JPMorgan?</b></p> <p>25 A. With respect to a customer, you</p>

<p style="text-align: right;">30</p> <p>1 Hirschfield</p> <p>2 have to show certain things, depending upon</p> <p>3 what kind of avoidance action it is; and</p> <p>4 those burdens are less, and the laws are well</p> <p>5 established.</p> <p>6 <b>Q. Give me a concrete example.</b></p> <p>7 A. Value would be an example.</p> <p>8 <b>Q. Give me an example.</b></p> <p>9 A. The law in Ponzi scheme cases has</p> <p>10 been universal that where you have fictitious</p> <p>11 profits, the customer did not get value in</p> <p>12 respect to those profits; whereas, for the</p> <p>13 non-customer, it would be a factual</p> <p>14 determination as to whether or not that</p> <p>15 non-customer provided value, recently close</p> <p>16 value or any value, in connection with the</p> <p>17 transaction.</p> <p>18 <b>Q. And in what way was the proof, the</b></p> <p>19 <b>trustee's proof with respect to value harder</b></p> <p>20 <b>in the case of JPMorgan than it would have</b></p> <p>21 <b>been in an action against a customer?</b></p> <p>22 A. With respect to a customer, you</p> <p>23 would look at cash in, cash out to determine</p> <p>24 whether or not that customer either had</p> <p>25 fictitious profits or not. If they did have</p>	<p style="text-align: right;">32</p> <p>1 Hirschfield</p> <p>2 <b>legal or factual questions that the trustee</b></p> <p>3 <b>faced in pursuing its avoidance claims</b></p> <p>4 <b>against JPMorgan that were more challenging</b></p> <p>5 <b>for the trustee by virtue of the fact that</b></p> <p>6 <b>JPMorgan was not a BLMIS customer?</b></p> <p>7 A. I was not involved with the</p> <p>8 litigation against JPMorgan, so I can't speak</p> <p>9 to all of the factors. But I understand</p> <p>10 generally that they were more difficult</p> <p>11 because of the nature of JPMorgan and its</p> <p>12 relationship with BLMIS.</p> <p>13 <b>Q. Now, another reason you cite in</b></p> <p>14 <b>paragraph 63 of your declaration is that,</b></p> <p>15 <b>"The trustee asserted a variety of claims,</b></p> <p>16 <b>both avoidance and common law claims, against</b></p> <p>17 <b>JPMorgan that it did not assert against</b></p> <p>18 <b>Optimal, including for JPMorgan's role as</b></p> <p>19 <b>BLMIS' banker and lender, and as a subsequent</b></p> <p>20 <b>transferee, all of which require a higher</b></p> <p>21 <b>standard of pleading and proof than</b></p> <p>22 <b>preference claims like those settled in</b></p> <p>23 <b>Optimal."</b></p> <p>24 <b>You would agree, though, that at</b></p> <p>25 <b>the time of the JPMorgan settlement, the 2nd</b></p>
<p style="text-align: right;">31</p> <p>1 Hirschfield</p> <p>2 fictitious profits, those profits would be no</p> <p>3 value given for those profits.</p> <p>4 With respect to a non-customer, you</p> <p>5 would have to look at whether or not to view</p> <p>6 value as a factual matter. And I don't know</p> <p>7 what the situation was with JPMorgan, but</p> <p>8 certainly it's a more involved and complex</p> <p>9 analysis than whether or not, looking at an</p> <p>10 accounting book, they gave -- there was</p> <p>11 fictitious profits or not.</p> <p>12 <b>Q. Well, you would agree some of the</b></p> <p>13 <b>trustee's avoidance claims against JPMorgan</b></p> <p>14 <b>related to repayment of a loan, correct?</b></p> <p>15 A. Yes.</p> <p>16 <b>Q. How is the determination of value</b></p> <p>17 <b>versus non-value for those repayments more</b></p> <p>18 <b>complex than it would be in a case against a</b></p> <p>19 <b>direct customer?</b></p> <p>20 A. I would think with respect to a</p> <p>21 loan you would have to see the circumstances</p> <p>22 of the loan, to see whether value is given or</p> <p>23 not; and how you would determine that would</p> <p>24 be up to the court, ultimately.</p> <p>25 <b>Q. Besides value, are there any other</b></p>	<p style="text-align: right;">33</p> <p>1 Hirschfield</p> <p>2 <b>Circuit had affirmed Judge McMahon's</b></p> <p>3 <b>dismissal of the common law claims?</b></p> <p>4 A. I believe that's correct.</p> <p>5 <b>Q. And the settlement that Optimal has</b></p> <p>6 <b>challenged -- "challenge" is the wrong</b></p> <p>7 <b>word -- and the settlement with respect to</b></p> <p>8 <b>which Optimal has invoked the equal treatment</b></p> <p>9 <b>provision is a settlement of the trustee's</b></p> <p>10 <b>avoidance power claims only?</b></p> <p>11 A. Correct.</p> <p>12 <b>Q. There is a separate settlement</b></p> <p>13 <b>concerning the common law claims that were</b></p> <p>14 <b>dismissed, correct?</b></p> <p>15 A. Yes.</p> <p>16 <b>Q. And none of the considerations</b></p> <p>17 <b>JPMorgan paid in connection with the</b></p> <p>18 <b>avoidance power claims settlement was paid in</b></p> <p>19 <b>connection with the settlement of the common</b></p> <p>20 <b>law claims?</b></p> <p>21 A. I believe there was one, while the</p> <p>22 settlement was denominated as a separate</p> <p>23 settlement, there was one overarching</p> <p>24 settlement of not just our claims but other</p> <p>25 claims as well, with JPMorgan.</p>

<p>34</p> <p>1 Hirschfield</p> <p>2 <b>Q. But the settlement that is the</b></p> <p>3 <b>subject of this proceeding was a settlement</b></p> <p>4 <b>only of the trustee's avoidance power claims</b></p> <p>5 <b>against JPMorgan?</b></p> <p>6 A. I believe that that was a piece of</p> <p>7 an overall larger settlement.</p> <p>8 <b>Q. It was set forth, however, in a</b></p> <p>9 <b>standalone, separate standalone settlement</b></p> <p>10 <b>agreement, correct?</b></p> <p>11 A. Yes, yes.</p> <p>12 <b>Q. Now, another reason you cite in</b></p> <p>13 <b>paragraph 63 is, "The JPMorgan settlement</b></p> <p>14 <b>with the trustee was part of contemporaneous</b></p> <p>15 <b>settlements relating to its wrong on the</b></p> <p>16 <b>Madoff fraud with the Department of Justice</b></p> <p>17 <b>and other Federal authorities, as well as</b></p> <p>18 <b>with class counsel representing a class of</b></p> <p>19 <b>BLMIS customers, whereas the Optimal</b></p> <p>20 <b>settlement involved only the trustee."</b></p> <p>21 <b>To which of the similarity factors</b></p> <p>22 <b>that are identified in the settlement</b></p> <p>23 <b>agreement with Optimal is simultaneous</b></p> <p>24 <b>settlement by JPM with other authorities and</b></p> <p>25 <b>entities relevant?</b></p>	<p>36</p> <p>1 Hirschfield</p> <p>2 of the day.</p> <p>3 <b>Q. Well, the settlement of the</b></p> <p>4 <b>avoidance power action that you executed with</b></p> <p>5 <b>JPMorgan, that goes to the trustee's customer</b></p> <p>6 <b>fund, if I'm using the term correctly? Is</b></p> <p>7 <b>that the right term --</b></p> <p>8 A. Yes.</p> <p>9 <b>Q. -- the customer fund?</b></p> <p>10 A. Yes.</p> <p>11 <b>Q. And the principles of distribution</b></p> <p>12 <b>of that customer fund differ significantly,</b></p> <p>13 <b>you would agree, from the principles that</b></p> <p>14 <b>govern distribution of, say, the DOJ's --</b></p> <p>15 <b>it's called remission fund, correct?</b></p> <p>16 A. There are differences between the</p> <p>17 two funds.</p> <p>18 <b>Q. Such that there could be profoundly</b></p> <p>19 <b>different distributions to different Madoff</b></p> <p>20 <b>victims, under the two different sets of</b></p> <p>21 <b>distribution?</b></p> <p>22 MR. SHEEHAN: Object to the form.</p> <p>23 A. I don't know that I would agree</p> <p>24 with "profoundly." There could be some</p> <p>25 differences, but there may be ways to make</p>
<p>35</p> <p>1 Hirschfield</p> <p>2 A. I'm not sure there is any that are</p> <p>3 triggered, per se, but this list is a</p> <p>4 non-exclusive list, and these are certain</p> <p>5 examples.</p> <p>6 <b>Q. Why in your view would the fact</b></p> <p>7 <b>that JPMorgan resolved class action and DOJ</b></p> <p>8 <b>investigations at the same time that it</b></p> <p>9 <b>resolved the avoidance power claims bear upon</b></p> <p>10 <b>application of equal treatment provision to</b></p> <p>11 <b>the avoidance powers settlement?</b></p> <p>12 A. I think there are a number of</p> <p>13 reasons. One reason would be that we knew a</p> <p>14 large amount of money was going to Madoff</p> <p>15 victims, either through us or through other</p> <p>16 means, and that certainly influenced or could</p> <p>17 influence a decision on how you settle any</p> <p>18 particular part of the claims.</p> <p>19 <b>Q. In what way?</b></p> <p>20 A. Money to some extent is fungible.</p> <p>21 So whether or not they gave a little more</p> <p>22 value here or a little more value there</p> <p>23 doesn't necessarily matter or might not</p> <p>24 necessarily matter quite as much, as long as</p> <p>25 the money was going to the victims at the end</p>	<p>37</p> <p>1 Hirschfield</p> <p>2 that up.</p> <p>3 <b>Q. And similarly, a class action</b></p> <p>4 <b>settlement is distributed in ways very</b></p> <p>5 <b>different than the way the Madoff customer</b></p> <p>6 <b>fund is distributed, correct?</b></p> <p>7 A. Again, there could be some</p> <p>8 differences, I don't know how significant.</p> <p>9 <b>Q. Well, for one thing, monies paid to</b></p> <p>10 <b>a class action settlement fund, there are</b></p> <p>11 <b>fees paid to administrators and class action</b></p> <p>12 <b>lawyers, correct?</b></p> <p>13 A. I assume there are some fees paid.</p> <p>14 <b>Q. And no fees that the trustee</b></p> <p>15 <b>collects are paid to Baker &amp; Hostetler?</b></p> <p>16 A. That's right.</p> <p>17 (Discussion off the record.)</p> <p>18 MR. GREENWALD: Could I hear the</p> <p>19 question read back.</p> <p>20 (A portion of the record was read.)</p> <p>21 <b>Q. None of the settlement proceeds</b></p> <p>22 <b>that the trustee collects are paid to the</b></p> <p>23 <b>Baker &amp; Hostetler firm?</b></p> <p>24 A. Yes, that's correct.</p> <p>25 <b>Q. SIPA pays your fees 100 percent?</b></p>

<p>38</p> <p>1 Hirschfield</p> <p>2 A. Yes.</p> <p>3 <b>Q. SIPC, I'm sorry, SIPC.</b></p> <p>4 A. Yes, that's right.</p> <p>5 <b>Q. And you would agree that your</b></p> <p>6 <b>client, Mr. Picard, has a duty to maximize</b></p> <p>7 <b>the size of the Madoff customer fund?</b></p> <p>8 A. Yes.</p> <p>9 <b>Q. Any resolution that results in a</b></p> <p>10 <b>diminution of the customer fund is an outcome</b></p> <p>11 <b>that the, that Mr. Picard has a duty to</b></p> <p>12 <b>attempt to avert?</b></p> <p>13 A. He has a duty to maximize</p> <p>14 recoveries, and there are many ways to do</p> <p>15 that.</p> <p>16 <b>Q. So my question I guess is: How</b></p> <p>17 <b>would the fact that JPMorgan was paying</b></p> <p>18 <b>funds, money to other victim funds, to</b></p> <p>19 <b>plaintiff classes and their counsel motivate</b></p> <p>20 <b>him to execute a settlement for a lower</b></p> <p>21 <b>amount than he would have agreed to execute</b></p> <p>22 <b>in the absence of those collateral</b></p> <p>23 <b>settlements?</b></p> <p>24 A. How could he or how would he?</p> <p>25 MR. GREENWALD: Can I have the</p>	<p>40</p> <p>1 Hirschfield</p> <p>2 proceeding and those in the other, the people</p> <p>3 in the other two funds.</p> <p>4 <b>Q. Okay, but perhaps there is overlap,</b></p> <p>5 <b>but that overlap is incidental. Let's take</b></p> <p>6 <b>the situation where there isn't overlap.</b></p> <p>7 <b>Did the Madoff trustee have any</b></p> <p>8 <b>duty to maximize recovery to a Madoff victim</b></p> <p>9 <b>who does not hold any approved claim in the</b></p> <p>10 <b>SIPA proceeding?</b></p> <p>11 A. No.</p> <p>12 <b>Q. And does the Madoff trustee have</b></p> <p>13 <b>any legal duty to seek recoveries for the</b></p> <p>14 <b>holder of an approved claim incremental to</b></p> <p>15 <b>the amount of the approved claim?</b></p> <p>16 MR. SHEEHAN: Object to the form of</p> <p>17 the question.</p> <p>18 A. I'm not sure I understand the</p> <p>19 question.</p> <p>20 <b>Q. Does the Madoff trustee have any</b></p> <p>21 <b>duty to seek recoveries for certain holders</b></p> <p>22 <b>of approved claims that exceed the recovery</b></p> <p>23 <b>those approved claim holders are entitled to</b></p> <p>24 <b>through the SIPA proceeding?</b></p> <p>25 MR. SHEEHAN: Same objection.</p>
<p>39</p> <p>1 Hirschfield</p> <p>2 question?</p> <p>3 (A portion of the record was read.)</p> <p>4 THE WITNESS: Thank you.</p> <p>5 A. The trustee has to take into</p> <p>6 account a number of factors, when deciding</p> <p>7 whether to litigate or settle or do something</p> <p>8 else, and certainly one of the factors he</p> <p>9 could consider is whether, as part of an</p> <p>10 overall settlement, the group of Madoff</p> <p>11 victims as a whole are better off or worse</p> <p>12 off.</p> <p>13 <b>Q. Which Madoff victims?</b></p> <p>14 A. All Madoff victims.</p> <p>15 <b>Q. Again, though, I thought the</b></p> <p>16 <b>trustee has a very clear statutory duty to</b></p> <p>17 <b>maximize recoveries by recognized claimants</b></p> <p>18 <b>in the SIPA proceeding, correct?</b></p> <p>19 A. Yes.</p> <p>20 <b>Q. And by the same token, I would</b></p> <p>21 <b>think he has no duty whatsoever to concern</b></p> <p>22 <b>himself with recoveries by persons who do not</b></p> <p>23 <b>hold approved claims?</b></p> <p>24 A. There is overlap, almost -- a lot</p> <p>25 of overlap between the victims in our</p>	<p>41</p> <p>1 Hirschfield</p> <p>2 A. I'm still not understanding. I'm</p> <p>3 sorry.</p> <p>4 MR. GREENWALD: I think it's clear.</p> <p>5 Why don't you read it back, and if</p> <p>6 you still don't understand I'll try it</p> <p>7 again.</p> <p>8 (A portion of the record was read.)</p> <p>9 A. I'm sorry. I don't understand the</p> <p>10 question.</p> <p>11 <b>Q. Let me give you a simple example.</b></p> <p>12 <b>You have a Madoff victim with an approved</b></p> <p>13 <b>claim, a claim approved by Mr. Picard for</b></p> <p>14 <b>\$100.</b></p> <p>15 <b>Does the Madoff trustee have any</b></p> <p>16 <b>legal duty to see to it that that victim</b></p> <p>17 <b>obtains compensation from some other source</b></p> <p>18 <b>such that his total victim recovery would be</b></p> <p>19 <b>say \$105 or 110?</b></p> <p>20 (Discussion off the record.)</p> <p>21 MR. GREENWALD: Let's withdraw</p> <p>22 that.</p> <p>23 <b>Q. Let's assume an approved Madoff</b></p> <p>24 <b>claim holder who is entitled to a</b></p> <p>25 <b>distribution from the SIPA estate of \$70.</b></p>

<p style="text-align: right;">42</p> <p>1           <b>Hirschfield</b></p> <p>2           <b>Does the Madoff trustee have any</b></p> <p>3 <b>legal duty to encourage or facilitate that</b></p> <p>4 <b>claim holder's receipt of additional</b></p> <p>5 <b>compensation from other sources? And if so,</b></p> <p>6 <b>what other sources would that be?</b></p> <p>7           A. In your example, the claimant has a</p> <p>8 claim of \$70?</p> <p>9           <b>Q. Well, he has a claim for X, for</b></p> <p>10 <b>which he will be entitled to get</b></p> <p>11 <b>distributions from the customer fund of, say,</b></p> <p>12 <b>\$70. Let's just hypothesize that, okay?</b></p> <p>13           <b>So clearly in your view, I think</b></p> <p>14 <b>it's legally correct, Picard has a duty to</b></p> <p>15 <b>see to it that that customer gets his or her</b></p> <p>16 <b>\$70, correct?</b></p> <p>17           A. Yes.</p> <p>18           <b>Q. Does, once that \$70 is --</b></p> <p>19           A. He has a duty -- I'm sorry, he has</p> <p>20 a duty to see that he gets as much of the</p> <p>21 claim paid as possible.</p> <p>22           <b>Q. Correct, correct, as much of the</b></p> <p>23 <b>claim paid as possible from the customer</b></p> <p>24 <b>fund?</b></p> <p>25           A. Yes.</p>	<p style="text-align: right;">44</p> <p>1           <b>Hirschfield</b></p> <p>2 <b>entities?</b></p> <p>3           A. Yes.</p> <p>4           <b>Q. And you will agree that the Optimal</b></p> <p>5 <b>settlement was the very first settlement the</b></p> <p>6 <b>trustee executed with any prospective or</b></p> <p>7 <b>actual avoidance action defendant?</b></p> <p>8           A. Yes. First large one, anyway.</p> <p>9           <b>Q. Well, was it the first or the first</b></p> <p>10 <b>large one?</b></p> <p>11           A. Again, I didn't arrive at Baker</p> <p>12 until March of 2009, so I don't know whether</p> <p>13 there was any small ones before then; but</p> <p>14 certainly it was the first significant one.</p> <p>15           <b>Q. You think it was the first?</b></p> <p>16           A. I think so.</p> <p>17           <b>Q. Would you now turn to Mr. Levin's</b></p> <p>18 <b>declaration, unless you've memorized it.</b></p> <p>19 <b>(Exhibit 5, Declaration of Richard</b></p> <p>20 <b>Levin Regarding Application of the Equal</b></p> <p>21 <b>Treatment Provision to the Settlement</b></p> <p>22 <b>Agreement Between the Trustee and</b></p> <p>23 <b>JPMorgan Chase &amp; Co., et al., marked for</b></p> <p>24 <b>identification, this date.)</b></p> <p>25           <b>Q. So if you could turn to page 16,</b></p>
<p style="text-align: right;">43</p> <p>1           Hirschfield</p> <p>2           <b>Q. Does Mr. Picard have a duty to see</b></p> <p>3 <b>to it that that same approved claim holder</b></p> <p>4 <b>gets compensation from any other source?</b></p> <p>5           A. A duty, no. We have cooperated</p> <p>6 with others to get settlements or other</p> <p>7 results that enure to the benefit of Madoff</p> <p>8 victims.</p> <p>9           (Discussion off the record.)</p> <p>10           <b>Q. One of the similarity factors</b></p> <p>11 <b>identified in the Optimal estate settlement</b></p> <p>12 <b>is "The stage of any litigation by the</b></p> <p>13 <b>trustee against the defendant."</b></p> <p>14           <b>Do you agree that I've read that</b></p> <p>15 <b>correctly?</b></p> <p>16           A. For a group of defendants taken as</p> <p>17 a whole, yes.</p> <p>18           <b>Q. And you will agree that the Optimal</b></p> <p>19 <b>settlement occurred before any litigation had</b></p> <p>20 <b>been filed by the trustee against any Optimal</b></p> <p>21 <b>fund?</b></p> <p>22           A. Yes.</p> <p>23           <b>Q. And it occurred after the trustee</b></p> <p>24 <b>had served but had not sought to enforce</b></p> <p>25 <b>Rule 2004 subpoenas against certain Optimal</b></p>	<p style="text-align: right;">45</p> <p>1           <b>Hirschfield</b></p> <p>2 <b>paragraph 21(e). The very last clause.</b></p> <p>3           <b>Would you agree --</b></p> <p>4           A. I'm sorry, what page again?</p> <p>5           <b>Q. Last page, last sentence, last</b></p> <p>6 <b>clause.</b></p> <p>7           <b>Would you agree with Mr. Levin that</b></p> <p>8 <b>there is a, common practice in bankruptcy</b></p> <p>9 <b>cases that early settlements of avoiding</b></p> <p>10 <b>power litigation are usually for less than</b></p> <p>11 <b>settlements at later stages"?</b></p> <p>12           A. I'm sorry, I'm not seeing where you</p> <p>13 are talking about.</p> <p>14           MR. SHEEHAN: The last page.</p> <p>15           <b>Q. The last sentence, last clause?</b></p> <p>16           A. Okay, yes, I'm sorry.</p> <p>17           <b>Q. Would you agree with Mr. Levin that</b></p> <p>18 <b>there is "A common practice in bankruptcy</b></p> <p>19 <b>cases that early settlements of the avoiding</b></p> <p>20 <b>power litigation are usually for less than</b></p> <p>21 <b>settlements at later stages"?</b></p> <p>22           A. Oftentimes.</p> <p>23           <b>Q. So you would agree?</b></p> <p>24           A. It depends upon the facts, but in</p> <p>25 many cases it makes sense for a trustee to</p>

<p style="text-align: right;">46</p> <p>1 Hirschfield</p> <p>2 settle or a debtor to settle things early to</p> <p>3 avoid litigation costs.</p> <p>4 <b>Q. It's a common practice, as Mr.</b></p> <p>5 <b>Levin says, yes?</b></p> <p>6 A. Yes.</p> <p>7 <b>Q. Now, you mentioned that you've been</b></p> <p>8 <b>personally involved in negotiating</b></p> <p>9 <b>settlements with other avoiding power</b></p> <p>10 <b>defendants.</b></p> <p>11 <b>Are you aware of instances in which</b></p> <p>12 <b>the trustee, in the course of those</b></p> <p>13 <b>negotiations, has resisted settlements at</b></p> <p>14 <b>below an 85 percent benchmark, on the ground</b></p> <p>15 <b>that the settlement under consideration is</b></p> <p>16 <b>occurring at a stage more advanced than the</b></p> <p>17 <b>stage at which Optimal settled?</b></p> <p>18 THE WITNESS: Can you read that</p> <p>19 back?</p> <p>20 (A portion of the record was read.)</p> <p>21 A. If you're asking whether the reason</p> <p>22 why we resisted settlement was a different</p> <p>23 stage of litigation, I don't know the</p> <p>24 instances of that particular situation.</p> <p>25 <b>Q. I guess I'm asking for more</b></p>	<p style="text-align: right;">48</p> <p>1 <b>Hirschfield</b></p> <p>2 <b>isn't that correct?</b></p> <p>3 A. There are some that were similar.</p> <p>4 I don't know if less advanced is correct or</p> <p>5 not.</p> <p>6 <b>Q. There was no question, though, that</b></p> <p>7 <b>Optimal was the first significant settlement?</b></p> <p>8 A. Yes.</p> <p>9 <b>Q. And it occurred before any</b></p> <p>10 <b>litigation had been filed?</b></p> <p>11 A. Yes.</p> <p>12 <b>Q. So by definition, if you engaged in</b></p> <p>13 <b>settlement talks with a group of defendants</b></p> <p>14 <b>or a defendant against whom a case has been</b></p> <p>15 <b>filed, that group of defendants is at a stage</b></p> <p>16 <b>in the litigation more advanced than the</b></p> <p>17 <b>stage at which Optimal was?</b></p> <p>18 A. That's correct.</p> <p>19 <b>Q. And in general, a settlement in</b></p> <p>20 <b>which the trustee has taken the view that a</b></p> <p>21 <b>higher settlement percentage is appropriate,</b></p> <p>22 <b>the more advanced the stage of litigation at</b></p> <p>23 <b>which the trustee is settling?</b></p> <p>24 MR. SHEEHAN: Object to the form of</p> <p>25 the question.</p>
<p style="text-align: right;">47</p> <p>1 <b>Hirschfield</b></p> <p>2 <b>information along the following lines: Have</b></p> <p>3 <b>there been situations in negotiations of</b></p> <p>4 <b>other settlements that you've been involved</b></p> <p>5 <b>in where a defendant has come to you and</b></p> <p>6 <b>proposed a benchmark settlement or a</b></p> <p>7 <b>settlement at one percentage and cited the</b></p> <p>8 <b>Optimal settlement to support that portion,</b></p> <p>9 <b>and the trustee's counsel or the trustee has</b></p> <p>10 <b>responded that, no, that settlement</b></p> <p>11 <b>percentage is not appropriate, because</b></p> <p>12 <b>Optimal settled before litigation, and you're</b></p> <p>13 <b>settling at a much later stage?</b></p> <p>14 A. There are certainly instances where</p> <p>15 people have proposed settlements that we've</p> <p>16 said no to, for a lot of reasons, including</p> <p>17 the fact that it would be below the</p> <p>18 benchmark. I don't know that stage of</p> <p>19 litigation was a specific factor where we</p> <p>20 said yes or no.</p> <p>21 <b>Q. Well, it's hard to think of a group</b></p> <p>22 <b>of defendants or a defendant with whom you</b></p> <p>23 <b>would be engaged in settlement negotiations</b></p> <p>24 <b>where the stage of the litigation would have</b></p> <p>25 <b>been less advanced than the stage of Optimal;</b></p>	<p style="text-align: right;">49</p> <p>1 Hirschfield</p> <p>2 A. Again, not necessarily.</p> <p>3 <b>Q. All other factors being equal,</b></p> <p>4 <b>though, the trustee will tend to seek a</b></p> <p>5 <b>higher percentage in cases that are, have</b></p> <p>6 <b>advanced to a more advanced stage than the</b></p> <p>7 <b>stage that the Optimal litigation was at in</b></p> <p>8 <b>May of 2009?</b></p> <p>9 A. No.</p> <p>10 MR. SHEEHAN: Object to form.</p> <p>11 He answered. Go ahead.</p> <p>12 <b>Q. You would agree, though, as you say</b></p> <p>13 <b>in your declaration, paragraph 63, page 24,</b></p> <p>14 <b>that "The stage of the proceedings in</b></p> <p>15 <b>JPMorgan were vastly different than with</b></p> <p>16 <b>Optimal, as JPMorgan and the trustee engaged</b></p> <p>17 <b>in discovery under bankruptcy Rule 2004, a</b></p> <p>18 <b>complaint as amended had been filed against</b></p> <p>19 <b>JPMorgan, the reference had been withdrawn,</b></p> <p>20 <b>the district court had issued dispositive</b></p> <p>21 <b>rulings on certain of the trustee's claims,</b></p> <p>22 <b>direct appeals and a petition for certiorari</b></p> <p>23 <b>were filed relating to the district court</b></p> <p>24 <b>ruling, and the case was proceeding to</b></p> <p>25 <b>discovery before the bankruptcy court at the</b></p>

<p>50</p> <p>1           <b>Hirschfield</b></p> <p>2   <b>time of settlement, JPMorgan having answered</b></p> <p>3   <b>the complaint."</b></p> <p>4       A. Yes.</p> <p>5       <b>Q. And you would agree that that vast</b></p> <p>6   <b>difference in stage of litigation is a factor</b></p> <p>7   <b>that, under the equal treatment provision,</b></p> <p>8   <b>weighs in favor of the application of that</b></p> <p>9   <b>provision to the JPMorgan settlement?</b></p> <p>10      A. No.</p> <p>11      <b>Q. Why not?</b></p> <p>12      A. There are a number of reasons. For</p> <p>13      one, you asked earlier about trustees or</p> <p>14      debtors settling cases early to avoid</p> <p>15      litigation costs. For us that is not</p> <p>16      necessarily a factor, because we, as you</p> <p>17      noted earlier, get paid by SIPC and therefore</p> <p>18      we're not spending money out of the customer</p> <p>19      funds to get more customer money.</p> <p>20      Second, with respect to someone who</p> <p>21      is advanced in litigation, there are things</p> <p>22      that happen in a litigation, or could happen</p> <p>23      in a litigation, that could affect one's view</p> <p>24      of the case.</p> <p>25      <b>Q. Would you agree, all things being</b></p>	<p>52</p> <p>1           <b>Hirschfield</b></p> <p>2       A. Okay.</p> <p>3       <b>Q. So with that qualification, you</b></p> <p>4   <b>would agree with the proposition that the</b></p> <p>5   <b>trustee has an interest in encouraging</b></p> <p>6   <b>settlements that occur earlier in the</b></p> <p>7   <b>litigation or pre-litigation process?</b></p> <p>8       A. Generally speaking, settlements of</p> <p>9   equal value that happen earlier would be</p> <p>10   better.</p> <p>11      <b>Q. And one way to facilitate such</b></p> <p>12   <b>settlements is to make it clear to the</b></p> <p>13   <b>community of prospective or actual clawback</b></p> <p>14   <b>defendants that early settlements will</b></p> <p>15   <b>receive more favorable treatment than later?</b></p> <p>16      A. Are you asking whether we said</p> <p>17   that?</p> <p>18      <b>Q. No. As a matter of just principle,</b></p> <p>19   <b>you would agree that that would help you</b></p> <p>20   <b>realize or achieve earlier settlements?</b></p> <p>21      A. It does.</p> <p>22      <b>Q. So under your understanding of the</b></p> <p>23   <b>equal treatment provision, how does the stage</b></p> <p>24   <b>at which litigation is settled affect whether</b></p> <p>25   <b>the equal treatment provision applies or not?</b></p>
<p>51</p> <p>1           <b>Hirschfield</b></p> <p>2   <b>equal, that the trust has an interest in</b></p> <p>3   <b>encouraging settlements that occur earlier</b></p> <p>4   <b>rather than later in the litigation process?</b></p> <p>5       A. It depends upon the settlement</p> <p>6   terms.</p> <p>7       <b>Q. Well, generally, even though you</b></p> <p>8   <b>are being paid by SIPC, not by the Madoff</b></p> <p>9   <b>entities, I would have to think that the</b></p> <p>10   <b>trustee believes that the settlements that</b></p> <p>11   <b>happen quicker and with less expenditures of</b></p> <p>12   <b>resources by counsel are to be encouraged</b></p> <p>13   <b>rather than discouraged, because such earlier</b></p> <p>14   <b>settlements not only facilitate faster</b></p> <p>15   <b>distributions to the victims but also enable</b></p> <p>16   <b>the trustee to devote his resources to other</b></p> <p>17   <b>recovery matters.</b></p> <p>18      MR. SHEEHAN: Object to form.</p> <p>19      A. Generally speaking, it's better to</p> <p>20      bring money in earlier, so we can distribute</p> <p>21      it, but it depends upon the settlement terms</p> <p>22      about whether we take a particular deal or</p> <p>23      not.</p> <p>24      <b>Q. That's why I said all other things</b></p> <p>25   <b>being equal.</b></p>	<p>53</p> <p>1           <b>Hirschfield</b></p> <p>2       A. I think it depends on a lot of</p> <p>3   factors, on the facts that get developed.</p> <p>4       <b>Q. Well, when you negotiated the equal</b></p> <p>5   <b>treatment provision with Optimal, right?</b></p> <p>6       A. Yes.</p> <p>7       <b>Q. I take it you had some idea as to</b></p> <p>8   <b>how it would be applied in the future, right?</b></p> <p>9       A. Yes.</p> <p>10      <b>Q. You, I take it, recommended to</b></p> <p>11   <b>Mr. Picard that he opt for or enter into a</b></p> <p>12   <b>settlement with the equal treatment</b></p> <p>13   <b>provision, as it appears; and I take it,</b></p> <p>14   <b>then, you had a reason why you were</b></p> <p>15   <b>comfortable recommending that provision to</b></p> <p>16   <b>him as it appears in the settlement, correct?</b></p> <p>17      A. Yes.</p> <p>18      <b>Q. So what was your understanding as</b></p> <p>19   <b>to how the stage of the litigation factor</b></p> <p>20   <b>would play out, in situations in the future</b></p> <p>21   <b>in which Optimal invoked the clause?</b></p> <p>22      A. I think this was one of them that</p> <p>23   was really an open question, and I think this</p> <p>24   was very fact dependent. If, for instance,</p> <p>25   you litigated a case and got to a more</p>

<p>54</p> <p>1 Hirschfield</p> <p>2 advanced stage, but you felt your case wasn't</p> <p>3 as firm as you'd hoped it would be, you might</p> <p>4 settle for a percentage that's lower than</p> <p>5 85 percent. And because of the advanced</p> <p>6 stage where you developed your facts,</p> <p>7 developed the case, you might not believe</p> <p>8 that 85 percent recovery is something you</p> <p>9 could -- you could achieve, in which case the</p> <p>10 MFN should not apply.</p> <p>11 Whereas, in other situations, it</p> <p>12 could be a situation that you referenced</p> <p>13 earlier, where early settlement might deserve</p> <p>14 a little bit of discount versus later ones.</p> <p>15 <b>Q. So under your view of the equal</b></p> <p>16 <b>treatment provision, as of the time you</b></p> <p>17 <b>recommended to the trustee that he execute</b></p> <p>18 <b>and as of today, the stage of the litigation</b></p> <p>19 <b>factor could either cut against the trustee</b></p> <p>20 <b>or in favor of the trustee, with respect to a</b></p> <p>21 <b>settlement that occurs later in litigation</b></p> <p>22 <b>than the stage at which the Optimal claims</b></p> <p>23 <b>were in?</b></p> <p>24 MR. SHEEHAN: Object as to form.</p> <p>25 A. I think it depends upon the facts</p>	<p>56</p> <p>1 Hirschfield</p> <p>2 A. I don't know the answer.</p> <p>3 <b>Q. I would like to direct your</b></p> <p>4 <b>attention back to Exhibit 4, page 10.</b></p> <p>5 <b>This is a motion that you</b></p> <p>6 <b>personally submitted to the late Judge</b></p> <p>7 <b>Lifland, correct?</b></p> <p>8 A. Yes.</p> <p>9 <b>Q. And on page 10, paragraph 22, you</b></p> <p>10 <b>wrote, "While it appears that the withdrawals</b></p> <p>11 <b>by the Optimal companies each represent a</b></p> <p>12 <b>textbook preference, there are other issues</b></p> <p>13 <b>that make proceeding against them for the</b></p> <p>14 <b>full amount of their withdrawals less than</b></p> <p>15 <b>certain. Indeed, the Optimal companies, both</b></p> <p>16 <b>of which are located in the Bahamas, and each</b></p> <p>17 <b>cited to the trustee potential jurisdictional</b></p> <p>18 <b>and other issues regarding the ability of the</b></p> <p>19 <b>trustee to collect on any judgment that he</b></p> <p>20 <b>might obtain."</b></p> <p>21 A. Yes, that's what it says.</p> <p>22 <b>Q. And what did you mean, when you</b></p> <p>23 <b>wrote that?</b></p> <p>24 A. I believe that Mr. Levin and his</p> <p>25 colleagues told my colleagues that there were</p>
<p>55</p> <p>1 Hirschfield</p> <p>2 of the particular settlement.</p> <p>3 <b>Q. Can you offer --</b></p> <p>4 MR. GREENWALD: We've gone a little</p> <p>5 over an hour. Maybe now is a good time</p> <p>6 for a break. We're doing okay on time.</p> <p>7 MR. SHEEHAN: Yes, absolutely.</p> <p>8 (A brief recess was taken.)</p> <p>9 <b>Q. So when you were negotiating the</b></p> <p>10 <b>Optimal settlement in '09, you of course were</b></p> <p>11 <b>aware that SUS and Arbitrage were Bahamian</b></p> <p>12 <b>funds?</b></p> <p>13 A. Yes. I knew they were foreign, I</p> <p>14 think Bahamian.</p> <p>15 <b>Q. And you were aware that they did</b></p> <p>16 <b>not have a physical presence in the United</b></p> <p>17 <b>States?</b></p> <p>18 A. We believed we had jurisdiction</p> <p>19 because of affiliates. I was not involved</p> <p>20 with that particular aspect, but I believe my</p> <p>21 colleagues believed we had jurisdiction.</p> <p>22 <b>Q. Let's take it in baby steps.</b></p> <p>23 <b>You were aware that the funds, both</b></p> <p>24 <b>of them, Arbitrage and SUS, lacked any</b></p> <p>25 <b>physical presence in the United States?</b></p>	<p>57</p> <p>1 Hirschfield</p> <p>2 potential jurisdictional issues. I think we</p> <p>3 concluded that we could overcome those</p> <p>4 issues, but whether we could or not was an</p> <p>5 open question.</p> <p>6 <b>Q. How did you conclude that you might</b></p> <p>7 <b>be able to -- first of all, what did you</b></p> <p>8 <b>understand the issues to be?</b></p> <p>9 A. That they were foreign entities.</p> <p>10 <b>Q. Without a US presence, correct?</b></p> <p>11 A. I don't know whether they had a US</p> <p>12 presence or not.</p> <p>13 <b>Q. Well, if they had a US presence,</b></p> <p>14 <b>presumably it would not have been much of a</b></p> <p>15 <b>challenge to assert jurisdiction over them,</b></p> <p>16 <b>correct?</b></p> <p>17 A. Yes.</p> <p>18 <b>Q. Or to collect a judgment against</b></p> <p>19 <b>them, correct?</b></p> <p>20 A. Presumably.</p> <p>21 <b>Q. Presumably. So the challenge</b></p> <p>22 <b>arises only if your understanding is that</b></p> <p>23 <b>they're exclusively foreign entities,</b></p> <p>24 <b>correct?</b></p> <p>25 A. Yes, but I think the analysis is</p>



<p>58</p> <p>1 Hirschfield</p> <p>2 more complicated than that.</p> <p>3 <b>Q. It may be more complicated, right.</b></p> <p>4 <b>But what is clear is that it's a lot simpler,</b></p> <p>5 <b>if they have a US presence, correct?</b></p> <p>6 A. Yes.</p> <p>7 <b>Q. But at the time of the settlement</b></p> <p>8 <b>you understand there are potential issues</b></p> <p>9 <b>associated with assertion of jurisdiction and</b></p> <p>10 <b>judgment collection, correct?</b></p> <p>11 A. Yes.</p> <p>12 <b>Q. You also think you might have ways</b></p> <p>13 <b>to get around them, correct?</b></p> <p>14 A. Correct.</p> <p>15 <b>Q. At the time, what did you think</b></p> <p>16 <b>those ways might be?</b></p> <p>17 A. I was not involved with that aspect</p> <p>18 of the case. That happened either before I</p> <p>19 arrived or shortly after I got to Baker</p> <p>20 Hostetler.</p> <p>21 <b>Q. But when you framed a motion to</b></p> <p>22 <b>Judge Lifland, presumably you had some idea</b></p> <p>23 <b>of what, what the issues were and how serious</b></p> <p>24 <b>they would be to overcome, correct?</b></p> <p>25 A. I believe that we -- yes.</p>	<p>60</p> <p>1 Hirschfield</p> <p>2 <b>Q. Were you aware of whether those</b></p> <p>3 <b>subsidiaries had any dealings with respect to</b></p> <p>4 <b>the Optimal investments?</b></p> <p>5 A. I do not know.</p> <p>6 <b>Q. And did you not know at the time</b></p> <p>7 <b>you submitted this motion to Judge Lifland?</b></p> <p>8 A. Whether the Sentry (phonetic) and</p> <p>9 their affiliates --</p> <p>10 <b>Q. Had dealings with respect --</b></p> <p>11 A. No, I did not know.</p> <p>12 <b>Q. The situation with respect to</b></p> <p>13 <b>jurisdiction over JPMorgan Chase I take it</b></p> <p>14 <b>was vastly different.</b></p> <p>15 A. Yes.</p> <p>16 <b>Q. JPMorgan Chase is a New York based</b></p> <p>17 <b>bank, correct?</b></p> <p>18 A. I know they're located in the US.</p> <p>19 I don't know whether they're in New York</p> <p>20 based or not.</p> <p>21 <b>Q. Well, there's an ATM downstairs in</b></p> <p>22 <b>case you need money.</b></p> <p>23 <b>And there is no issue as to the</b></p> <p>24 <b>enforceability of a bankruptcy or Southern</b></p> <p>25 <b>District of New York judgment against</b></p>
<p>59</p> <p>1 Hirschfield</p> <p>2 <b>Q. And what was your understanding?</b></p> <p>3 A. My understanding was that Optimal,</p> <p>4 through Mr. Levin and his colleagues here at</p> <p>5 Cravath, had claimed that there were</p> <p>6 jurisdictional challenges that we would have.</p> <p>7 I understand that my colleagues had looked at</p> <p>8 that, and I believe they had concluded that</p> <p>9 there might be ways to assert jurisdiction</p> <p>10 over these entities.</p> <p>11 <b>Q. What ways did they have in mind?</b></p> <p>12 A. I believe there were certain</p> <p>13 affiliates of Optimal that did business here.</p> <p>14 I also believe that there may have been, in</p> <p>15 the agreements between the Optimal companies</p> <p>16 and BLMIS, certain provisions that might have</p> <p>17 provided for jurisdiction in the United</p> <p>18 States.</p> <p>19 <b>Q. Do you know whether those</b></p> <p>20 <b>affiliates --</b></p> <p>21 A. Or they could be construed as</p> <p>22 invoking US jurisdiction.</p> <p>23 <b>Q. By affiliate, I take it, you mean</b></p> <p>24 <b>some of their subsidiaries?</b></p> <p>25 A. Yes.</p>	<p>61</p> <p>1 Hirschfield</p> <p>2 <b>JPMorgan Chase?</b></p> <p>3 A. I don't know of any.</p> <p>4 <b>Q. Now, I would like you to turn back</b></p> <p>5 <b>to Mr. Levin's declaration.</b></p> <p>6 <b>Now, in the remaining time,</b></p> <p>7 <b>hopefully not all the remaining time I have,</b></p> <p>8 <b>but in the remaining time for this</b></p> <p>9 <b>deposition, I want to ask you to focus on</b></p> <p>10 <b>every sentence in Mr. Levin's declaration,</b></p> <p>11 <b>beginning in paragraph 18.</b></p> <p>12 <b>To spare the court reporter and to</b></p> <p>13 <b>keep the transcript manageable, I'm not going</b></p> <p>14 <b>to quote every sentence; instead I'm just</b></p> <p>15 <b>going to refer to it, maybe with an</b></p> <p>16 <b>identifying phrase or two, so the record is</b></p> <p>17 <b>clear. I'm just going to basically have you</b></p> <p>18 <b>read them to yourself and then comment. I</b></p> <p>19 <b>think it will make for a clear transcript</b></p> <p>20 <b>overall.</b></p> <p>21 <b>So first I want you to read the</b></p> <p>22 <b>first sentence of paragraph 18, beginning "In</b></p> <p>23 <b>the two earlier drafts," and I want to ask</b></p> <p>24 <b>you if there is anything in that sentence</b></p> <p>25 <b>that Mr. Levin has written with which you</b></p>

16 (Pages 58 to 61)

<p style="text-align: right;">62</p> <p>1                   <b>Hirschfield</b> 2 <b>disagree.</b> 3       A. I would have to go back and look at 4 the earlier two drafts, but I believe, 5 generally speaking, the early drafts of the 6 settlement agreement, that most favored 7 nations clause had more binary qualities than 8 the later drafts, than the final agreement 9 did. 10       <b>Q. So you generally are in agreement</b> 11 <b>with Mr. Levin, with respect to the first</b> 12 <b>sentence?</b> 13       A. Yes. 14       <b>Q. The second sentence beginning, "For</b> 15 <b>example," do you agree with Mr. Levin, with</b> 16 <b>what Mr. Levin has said there?</b> 17       A. I would want to look at the earlier 18 draft to see what it actually says. 19       <b>Q. But assuming he's quoted the drafts</b> 20 <b>correctly, I take it you would agree with the</b> 21 <b>second sentence there?</b> 22       A. I mean, if he is correctly saying 23 what the earlier drafts said, then that's 24 correct. 25       <b>Q. I would like you to turn to the</b></p>	<p style="text-align: right;">64</p> <p>1                   <b>Hirschfield</b> 2 <b>principle that the harder it is for the</b> 3 <b>trustee to pursue the avoidance claims he</b> 4 <b>asserted against a group of defendants, the</b> 5 <b>more he would be justified in agreeing to a</b> 6 <b>settlement at a benchmark lower than</b> 7 <b>85 percent; and conversely, the easier it</b> 8 <b>would be for him to pursue those claims, the</b> 9 <b>less justified it would be?</b> 10       A. As a general principle, I think 11 that's right, although it may not apply in 12 every circumstance. 13       <b>Q. So if that's what Mr. Levin means</b> 14 <b>by "leverage," you generally agree with what</b> 15 <b>he's saying?</b> 16       A. Yes and no. For instance, the 17 \$40 million amount had nothing to do with 18 leverage. 19       <b>Q. Fair enough. Fair enough.</b> 20       <b>All right. Let's take, then, the</b> 21 <b>last sentence of paragraph 19.</b> 22       <b>Do you agree or disagree with what</b> 23 <b>Mr. Levin asserts in the sentence beginning,</b> 24 <b>"As a result"?</b> 25       A. The guiding principle is</p>
<p style="text-align: right;">63</p> <p>1                   <b>Hirschfield</b> 2 <b>next-to-last sentence of paragraph 18, the</b> 3 <b>one -- actually, let's take two at a time.</b> 4 <b>Let's take the final two sentences of</b> 5 <b>paragraph 18, beginning "Whether the</b> 6 <b>circumstances."</b> 7       <b>Do you agree or disagree with what</b> 8 <b>Mr. Levin is saying there?</b> 9       A. Yes, I agree. 10       <b>Q. I would like to now take as a group</b> 11 <b>the next two sentences in paragraph 19,</b> 12 <b>beginning, "In addition, I propose."</b> 13       <b>Do you agree or disagree with</b> 14 <b>Mr. Levin's assertions in those two</b> 15 <b>sentences?</b> 16       A. Well, I don't know what Mr. Levin 17 favored or didn't favor, for one. And also I 18 don't know that, to extent that the leverage 19 is necessarily the guiding principle which is 20 applicable. 21       <b>Q. Well, let's put aside the term</b> 22 <b>"leverage."</b> 23       <b>Would you agree that the primary</b> 24 <b>guiding principle that the equal treatment</b> 25 <b>provision was trying to apply was the</b></p>	<p style="text-align: right;">65</p> <p>1                   <b>Hirschfield</b> 2 similarity, so while one factor may or may 3 not disqualify a settlement, these are 4 factors and other factors a court can 5 consider in judging similarity or not. 6       If one factor is entirely 7 dissimilar, that very well could have 8 disqualify a settlement having the MFN clause 9 applied, or if it -- so it really depends 10 upon a lot of things in similarity overall. 11       <b>Q. But dissimilarity with respect to</b> 12 <b>one or more factors could be, I take it,</b> 13 <b>compensated by similarity or dissimilarity</b> 14 <b>with respect to others, such that two</b> 15 <b>settlements that differ in some respects</b> 16 <b>could nonetheless qualify as similar for</b> 17 <b>purposes of application of the equal</b> 18 <b>treatment provision?</b> 19       A. It depends upon the level of 20 dissimilarity and similarity. 21       <b>Q. But there is some level at which</b> 22 <b>two settlements having dissimilar factors can</b> 23 <b>nonetheless be similar enough so as to</b> 24 <b>trigger the equal treatment provision?</b> 25       A. That's a hypothetical, so it's hard</p>

<p style="text-align: right;">66</p> <p>1 Hirschfield</p> <p>2 to answer hypothetically.</p> <p>3 <b>Q. I don't think it's a hypothetical.</b></p> <p>4 <b>I think it's asking you to comment on how</b></p> <p>5 <b>this provision operates in the abstract.</b></p> <p>6 A. Again, I think the notion is</p> <p>7 similarity, whether the settlement was</p> <p>8 another entity, another customer, similar or</p> <p>9 not; and when judging similarity, a court can</p> <p>10 look at a lot of factors, including the ones</p> <p>11 cited in the provision of the agreement with</p> <p>12 Optimal.</p> <p>13 <b>Q. Let's turn to paragraph 21. We</b></p> <p>14 <b>will skip paragraph 20.</b></p> <p>15 A. Okay.</p> <p>16 <b>Q. Only because paragraph 20 relates</b></p> <p>17 <b>exclusively to Mr. Levin's state of mind, so</b></p> <p>18 <b>I'm not going to ask you to agree or disagree</b></p> <p>19 <b>with that.</b></p> <p>20 <b>But on paragraph 20, let's focus on</b></p> <p>21 <b>21(a), "Ability to pay."</b></p> <p>22 <b>Do you agree with what Mr. Levin</b></p> <p>23 <b>has states -- states in paragraph 21(a)?</b></p> <p>24 A. Yes, we had concerns about, if a</p> <p>25 particular defendant couldn't pay a</p>	<p style="text-align: right;">68</p> <p>1 Hirschfield</p> <p>2 from our perspective, we understood the</p> <p>3 nature of avoiding power claims to encompass</p> <p>4 a lot of things, including profits of</p> <p>5 principal, preferences or not, and generally</p> <p>6 the burdens of proof that we would have to</p> <p>7 show to avoid a transfer. So if our burden</p> <p>8 of proof was different, for instance, for</p> <p>9 principle, that would be a difference which</p> <p>10 would put it outside the MFN clause, because</p> <p>11 it would be not similar.</p> <p>12 <b>Q. Put it outside or just militate</b></p> <p>13 <b>against application of the equal treatment</b></p> <p>14 <b>provision?</b></p> <p>15 A. It would make a settlement</p> <p>16 dissimilar, not similar.</p> <p>17 <b>Q. Right. But the question I have is:</b></p> <p>18 <b>As you say, put it outside. Would -- in your</b></p> <p>19 <b>view, would the existence of a settled claim</b></p> <p>20 <b>for principal disqualify a settlement --</b></p> <p>21 <b>settled claim for principal disqualify the</b></p> <p>22 <b>settlement for potential application of the</b></p> <p>23 <b>equal treatment provision, or just be a</b></p> <p>24 <b>factor that militated against application of</b></p> <p>25 <b>the provision?</b></p>
<p style="text-align: right;">67</p> <p>1 Hirschfield</p> <p>2 settlement, that would be a factor that would</p> <p>3 make it not similar.</p> <p>4 <b>Q. Let's focus next on the first</b></p> <p>5 <b>paragraph of paragraph 21(b), "The Nature of</b></p> <p>6 <b>the Avoiding Power Claims."</b></p> <p>7 <b>Do you agree with what Mr. Levin</b></p> <p>8 <b>states in that first paragraph, beginning</b></p> <p>9 <b>"Originally, the trustee"?</b></p> <p>10 A. I believe that earlier drafts of</p> <p>11 the agreement dealt only with preferences. I</p> <p>12 don't remember whether we sought to do it or</p> <p>13 whether the original draft sought to do it.</p> <p>14 I do recall that Mr. Levin raised</p> <p>15 an issue with us about what I'll call</p> <p>16 gerrymandering a settlement, and that's why</p> <p>17 we discussed and ultimately changed the</p> <p>18 provision to include broader claims.</p> <p>19 <b>Q. Focus now on the second paragraph</b></p> <p>20 <b>of paragraph 21(b), beginning, "To the best</b></p> <p>21 <b>of my recollection."</b></p> <p>22 <b>Do you agree or disagree with</b></p> <p>23 <b>anything Mr. Levin says there?</b></p> <p>24 A. I don't know about "To the best of</p> <p>25 his recollection," but putting that aside,</p>	<p style="text-align: right;">69</p> <p>1 <b>Hirschfield</b></p> <p>2 A. In my mind, this is a particularly</p> <p>3 important one. They're all important, but</p> <p>4 this one is more important than perhaps the</p> <p>5 others. Because if your claim is dissimilar,</p> <p>6 if you are asserting dissimilar claims, that</p> <p>7 in and of itself would make one settlement</p> <p>8 different from another.</p> <p>9 And it also goes to whom you're</p> <p>10 suing, the nature of our claims. We talked</p> <p>11 earlier about the heading of that provision</p> <p>12 in paragraph 13 is relating to customers.</p> <p>13 Again, this goes to who you're suing and</p> <p>14 whether or not the claims are similar or not.</p> <p>15 <b>Q. I hear you saying in your mind this</b></p> <p>16 <b>factor would be particularly important, and I</b></p> <p>17 <b>don't want to quibble with that.</b></p> <p>18 <b>But you would agree that in the</b></p> <p>19 <b>settlement as executed, the nature of the</b></p> <p>20 <b>claims is one factor of several, correct?</b></p> <p>21 A. Yes.</p> <p>22 <b>Q. And the text of the settlement</b></p> <p>23 <b>itself does not purport to give that factor</b></p> <p>24 <b>any more primacy than any of the other four,</b></p> <p>25 <b>correct?</b></p>

<p style="text-align: right;">70</p> <p>1           Hirschfield</p> <p>2       A. Yes.</p> <p>3       <b>Q. So I go back to my first question,</b></p> <p>4 <b>which was: You would agree, I hope, I think,</b></p> <p>5 <b>that the mere presence of a claim for</b></p> <p>6 <b>recovery of principal by the trustee would</b></p> <p>7 <b>not absolutely disqualify a settlement for</b></p> <p>8 <b>application of the equal treatment provision</b></p> <p>9 <b>but would be only a factor militating against</b></p> <p>10 <b>its application?</b></p> <p>11       A. No, I think if you were to assert a</p> <p>12 different kind of claim against a defendant,</p> <p>13 that would make the claim dissimilar, not</p> <p>14 similar.</p> <p>15       <b>Q. So any claim for principal makes</b></p> <p>16 <b>the equal treatment provision inapplicable,</b></p> <p>17 <b>full stop?</b></p> <p>18       A. To the extent of the claim for the</p> <p>19 principal, yes.</p> <p>20       <b>Q. What do you mean by "to the extent</b></p> <p>21 <b>of the claim for the principal"?</b></p> <p>22       A. If we were bringing an action</p> <p>23 against a customer, asserting a claim for</p> <p>24 principal, that claim would be different and</p> <p>25 not similar to the claims brought against</p>	<p style="text-align: right;">72</p> <p>1           Hirschfield</p> <p>2       <b>Q. You don't think so.</b></p> <p>3       A. Because I think that the clause,</p> <p>4 the way it's drafted, talks about the claims</p> <p>5 being -- the nature of avoiding power claims</p> <p>6 are different. I think that militates</p> <p>7 heavily, very heavily in favor of the claims</p> <p>8 being different and not being similar.</p> <p>9       <b>Q. We can put aside the adverb.</b></p> <p>10       <b>You agree, though, it only</b></p> <p>11 <b>militates against application of the equal</b></p> <p>12 <b>treatment provision, the presence of a claim</b></p> <p>13 <b>for principal doesn't bar the application of</b></p> <p>14 <b>the equal treatment provision to a</b></p> <p>15 <b>settlement?</b></p> <p>16       A. I don't see how a court or anyone</p> <p>17 reading the agreement can look at a claim for</p> <p>18 principal as being similar to a claim of the</p> <p>19 nature we've brought against Optimal.</p> <p>20       <b>Q. Even accepting that, though,</b></p> <p>21 <b>couldn't -- under the language of the equal</b></p> <p>22 <b>treatment provision, it is possible for a</b></p> <p>23 <b>settlement overall to qualify for application</b></p> <p>24 <b>of that provision, even though among the</b></p> <p>25 <b>claims settled include claims for principal?</b></p>
<p style="text-align: right;">71</p> <p>1           Hirschfield</p> <p>2       Optimal.</p> <p>3       <b>Q. Correct. But would that settlement</b></p> <p>4 <b>therefore be outside the potential purview of</b></p> <p>5 <b>the equal treatment provision?</b></p> <p>6       A. I believe it would.</p> <p>7       <b>Q. And how would the language of the</b></p> <p>8 <b>agreement support that meaning?</b></p> <p>9       A. Because the nature of the avoiding</p> <p>10 power claims is different, and therefore the</p> <p>11 settlement of those claims would be not,</p> <p>12 would not be similar.</p> <p>13       <b>Q. But wouldn't you agree that if that</b></p> <p>14 <b>had been part of the mutual intent, a much</b></p> <p>15 <b>easier way to implement that intent would</b></p> <p>16 <b>have been to simply say, this clause, the</b></p> <p>17 <b>equal treatment provision, applies only to</b></p> <p>18 <b>settlements of avoiding power claims that do</b></p> <p>19 <b>not include claims for principal?</b></p> <p>20       A. It talks about similar claims.</p> <p>21       <b>Q. That's not my question.</b></p> <p>22       <b>Wouldn't that have been a much</b></p> <p>23 <b>clearer way to implement that intent than</b></p> <p>24 <b>what we have today in the agreement?</b></p> <p>25       A. No, I don't think so.</p>	<p style="text-align: right;">73</p> <p>1           Hirschfield</p> <p>2       A. It's possible.</p> <p>3       <b>Q. Next I would like you to turn to</b></p> <p>4 <b>paragraph 21(c) of Mr. Levin's declaration.</b></p> <p>5       <b>Do you agree with what Mr. Levin</b></p> <p>6 <b>has written in that paragraph,</b></p> <p>7 <b>"Jurisdictional" -- headed or captioned,</b></p> <p>8 <b>"Jurisdictional Connection and</b></p> <p>9 <b>Enforceability"?</b></p> <p>10       A. I generally agree. Again, the</p> <p>11 leverage I'm not sure came up, but you're</p> <p>12 using the leverage claim that you talked</p> <p>13 about earlier, I think that's generally</p> <p>14 correct.</p> <p>15       <b>Q. Right.</b></p> <p>16       <b>Now turn to 21(d).</b></p> <p>17       <b>Same question: Do you agree or</b></p> <p>18 <b>disagree with what Mr. Levin states in</b></p> <p>19 <b>paragraph 21(d), captioned, "Defendant</b></p> <p>20 <b>Knowledge Or Complicity"?</b></p> <p>21       A. I don't agree with the last</p> <p>22 sentence.</p> <p>23       <b>Q. So let me read that sentence into</b></p> <p>24 <b>the transcript.</b></p> <p>25       <b>This is the sentence that reads,</b></p>

<p style="text-align: right;">74</p> <p>1           <b>Hirschfield</b></p> <p>2    <b>"If another defendant knew or was complicit</b></p> <p>3    <b>or otherwise did not meet the good faith</b></p> <p>4    <b>requirement of section 548(c) as a defense to</b></p> <p>5    <b>a two-year or six-year claim for return of</b></p> <p>6    <b>principal, the trustee would have leverage in</b></p> <p>7    <b>negotiating a settlement that was at least as</b></p> <p>8    <b>strong as the leverage he had when</b></p> <p>9    <b>negotiating with SUS and Arbitrage, making</b></p> <p>10   <b>the circumstances of any resulting settlement</b></p> <p>11   <b>more similar."</b></p> <p>12           <b>Why don't you agree with what Mr.</b></p> <p>13    <b>Levin is saying in that sentence?</b></p> <p>14           A. The way I'm understanding his</p> <p>15    sentence it that if we are pursuing principal</p> <p>16    from someone who lacks good faith, that would</p> <p>17    make, that would give us more of an ability</p> <p>18    to go after that defendant, making us</p> <p>19    similar.</p> <p>20           However, whether or not they are in</p> <p>21    good faith or not is a complicated question</p> <p>22    of fact and law, and the defendant presumably</p> <p>23    would not agree with us that they acted in</p> <p>24    bad faith; and therefore, the particular</p> <p>25    facts and circumstances would have to be</p>	<p style="text-align: right;">76</p> <p>1           <b>Hirschfield</b></p> <p>2    <b>reasonably confident that it would able to</b></p> <p>3    <b>prove the defendants' knowledge or complicity</b></p> <p>4    <b>in Madoff's fraud, correct?</b></p> <p>5           A. Yes.</p> <p>6           <b>Q. And you would agree with Mr. Levin</b></p> <p>7    <b>that the more confident you were of your</b></p> <p>8    <b>ability to prove such culpable knowledge, the</b></p> <p>9    <b>more similar any settlement of such claim</b></p> <p>10   <b>would be to the Optimal settlement in which</b></p> <p>11   <b>knowledge and complicity was not an issue?</b></p> <p>12           A. But it also depends --</p> <p>13           <b>Q. Well, first answer that, yes or no,</b></p> <p>14    <b>and then say whatever you want to.</b></p> <p>15           A. Not necessarily, because it depends</p> <p>16    upon the defenses which defendants are</p> <p>17    raising. So we might assert someone acted</p> <p>18    with a lack of good faith. Evidence may or</p> <p>19    may not bear that out as you go down the</p> <p>20    road.</p> <p>21           <b>Q. Right, but that's why I qualified</b></p> <p>22    <b>my question with the more confident you feel</b></p> <p>23    <b>about the quality of the evidence, the more</b></p> <p>24    <b>similar a settlement of any such case would</b></p> <p>25    <b>be to the Optimal settlement in which</b></p>
<p style="text-align: right;">75</p> <p>1           Hirschfield</p> <p>2    studied to see whether or not we would have</p> <p>3    the ability to collect any amount, let alone</p> <p>4    85 percent.</p> <p>5           <b>Q. Well, there may certainly be cases</b></p> <p>6    <b>in which knowledge and good faith is</b></p> <p>7    <b>complicated, but by the same token, there are</b></p> <p>8    <b>some in which it's rather simple, agreed?</b></p> <p>9           A. Nothing is simple in this case.</p> <p>10           <b>Q. I mean, certainly in your capacity,</b></p> <p>11    <b>certainly in your work litigating and</b></p> <p>12    <b>negotiating settlements for Mr. Picard,</b></p> <p>13    <b>you've come across cases in which defendants,</b></p> <p>14    <b>in which the trustee had rather compelling</b></p> <p>15    <b>proof of knowledge and lack of good faith;</b></p> <p>16    <b>isn't that right?</b></p> <p>17           MR. SHEEHAN: Object to the form.</p> <p>18           A. Yes, there were cases that we</p> <p>19    believed defendants were lacking in good</p> <p>20    faith.</p> <p>21           <b>Q. And give me some examples of those.</b></p> <p>22           A. Certainly Mount Capital Fund was</p> <p>23    one, Picower would be another; Shapiro,</p> <p>24    perhaps.</p> <p>25           <b>Q. And in those cases the trustee felt</b></p>	<p style="text-align: right;">77</p> <p>1           <b>Hirschfield</b></p> <p>2    <b>knowledge and complicity just wasn't an issue</b></p> <p>3    <b>for either party?</b></p> <p>4           A. Yes, if you're asking if we think</p> <p>5    we have a slam dunk, if someone acted in bad</p> <p>6    faith, that would make it more similar.</p> <p>7           <b>Q. I take it, though, since you didn't</b></p> <p>8    <b>participate in the negotiation or litigation</b></p> <p>9    <b>of the JPMorgan action, you don't have any</b></p> <p>10   <b>view as to how strong the trustee's proof of</b></p> <p>11   <b>JPMorgan's knowledge or complicity in</b></p> <p>12   <b>Madoff's fraud is?</b></p> <p>13           A. That's correct.</p> <p>14           <b>Q. Now, let's turn to the last</b></p> <p>15    <b>paragraph, paragraph 21(e). And this also is</b></p> <p>16    <b>in two paragraphs, so let's take them in two</b></p> <p>17    <b>chunks.</b></p> <p>18           <b>Let's focus first on the first</b></p> <p>19    <b>paragraph of 21(e), "The Stage of the</b></p> <p>20    <b>Litigation."</b></p> <p>21           <b>Do you agree or disagree with what</b></p> <p>22    <b>Mr. Levin says in that first paragraph?</b></p> <p>23           A. In terms of the second sentence, I</p> <p>24    was not involved in initial discussions with</p> <p>25    Mr. Levin as to settlement, so I don't know</p>

<p style="text-align: right;">78</p> <p>1 Hirschfield</p> <p>2 whether he cited that provision or not as to</p> <p>3 the reason for a discount. I believe he</p> <p>4 might have, but I don't know for sure.</p> <p>5 In terms of the last sentence, as I</p> <p>6 stated earlier, I think that cuts both ways.</p> <p>7 As you live with a case and bring it down the</p> <p>8 road, certainly you come to learn of defenses</p> <p>9 and perhaps problematic facts or what have</p> <p>10 you, which may make a settlement, a</p> <p>11 settlement of less than 85 percent fully</p> <p>12 justified and make it dissimilar from</p> <p>13 Optimal.</p> <p>14 <b>Q. All right. Let's turn to the last</b></p> <p>15 <b>paragraph, then, the one beginning, "In the</b></p> <p>16 <b>earlier drafts."</b></p> <p>17 <b>Do you agree or disagree with what</b></p> <p>18 <b>Mr. Levin states there?</b></p> <p>19 A. I agree that the earlier drafts had</p> <p>20 a different provision. That was binary. I</p> <p>21 believe that -- well, I'm not sure why he</p> <p>22 proposed the more general, safer litigation</p> <p>23 factor. And as I said earlier, I don't</p> <p>24 necessarily agree with the last sentence.</p> <p>25 <b>Q. Although you do agree, as you said</b></p>	<p style="text-align: right;">80</p> <p>1 Hirschfield</p> <p>2 <b>your mind as particularly significant?</b></p> <p>3 A. Significant in what sense?</p> <p>4 <b>Q. In any sense. Memorable, large</b></p> <p>5 <b>amounts, unusual circumstances, complex legal</b></p> <p>6 <b>issues, complex drafting issues?</b></p> <p>7 A. A lot of them had complex issues.</p> <p>8 A lot of them had complicated facts. They</p> <p>9 tend to be, most of them for less money.</p> <p>10 <b>Q. Now, in the course of the, like I</b></p> <p>11 <b>said, at least 25 avoidance actions in which</b></p> <p>12 <b>you've participated in settlement, are there</b></p> <p>13 <b>any in which your discussions with the</b></p> <p>14 <b>defendants' counsel or other representatives</b></p> <p>15 <b>have included reference to or discussion</b></p> <p>16 <b>about the potential application of the equal</b></p> <p>17 <b>treatment provision in the Optimal</b></p> <p>18 <b>settlement?</b></p> <p>19 A. Yes. We're having negotiations</p> <p>20 where we have spoken about Optimal.</p> <p>21 <b>Q. And which, do you recall</b></p> <p>22 <b>specifically in which of those settlements</b></p> <p>23 <b>the issue has come up?</b></p> <p>24 A. I don't recall which ones they</p> <p>25 were, and I don't recall in some cases</p>
<p style="text-align: right;">79</p> <p>1 Hirschfield</p> <p>2 <b>earlier, that it is a common practice in</b></p> <p>3 <b>bankruptcy cases that early settlement to</b></p> <p>4 <b>avoid power litigation are usually settled</b></p> <p>5 <b>for less than settlements in later stages?</b></p> <p>6 A. Yes, but that doesn't necessarily</p> <p>7 apply to a separate proceeding such as ours.</p> <p>8 <b>Q. Okay. You can put your -- Mr.</b></p> <p>9 <b>Levin's declaration to the side.</b></p> <p>10 <b>Now, at the beginning of the</b></p> <p>11 <b>deposition you had mentioned that you had</b></p> <p>12 <b>participated in the settlement of five of the</b></p> <p>13 <b>16 significant trustee recoveries to date,</b></p> <p>14 <b>correct?</b></p> <p>15 A. Yes.</p> <p>16 <b>Q. Have you participated in</b></p> <p>17 <b>negotiation or drafting of settlements of any</b></p> <p>18 <b>other clawback -- avoidance actions?</b></p> <p>19 A. Yes, many.</p> <p>20 <b>Q. About how many?</b></p> <p>21 A. I couldn't tell you how many</p> <p>22 exactly, but probably at least 20, or 50. I</p> <p>23 mean 50.</p> <p>24 <b>Q. Do any -- other than the ones on</b></p> <p>25 <b>the, on the list of 16, do any stand out in</b></p>	<p style="text-align: right;">81</p> <p>1 Hirschfield</p> <p>2 whether we actually reached a settlement or</p> <p>3 not.</p> <p>4 I know there have been discussions</p> <p>5 where we've said we have a provision in our</p> <p>6 agreement with Optimal that might apply to</p> <p>7 your case, if we were to settle it, and we</p> <p>8 were constrained by the provision.</p> <p>9 <b>Q. Okay. As you sit here today,</b></p> <p>10 <b>trying as hard as you can to testify</b></p> <p>11 <b>truthfully under oath, can you recall any of</b></p> <p>12 <b>the either settlements in which those</b></p> <p>13 <b>discussions took place or the identities of</b></p> <p>14 <b>the lawyers with whom you had those</b></p> <p>15 <b>discussions?</b></p> <p>16 A. It might have come up in connection</p> <p>17 with Kingate. That's the only one I recall.</p> <p>18 There might have been others.</p> <p>19 <b>Q. And who at Kingate was your</b></p> <p>20 <b>counterpart in negotiating the Kingate</b></p> <p>21 <b>settlement?</b></p> <p>22 A. Robert Loigman is one.</p> <p>23 <b>Q. How do you spell his name?</b></p> <p>24 A. Loigman? L-O-I-G-M-A-N, I think.</p> <p>25 <b>Q. What firm?</b></p>



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INSTRUCTIONS TO WITNESS

Please read your deposition over carefully and make any necessary corrections. You should state the reason in the appropriate space on the errata sheet for any corrections that are made. After doing so, please sign the errata sheet and date it.

You are signing same subject to the changes you have noted on the errata sheet, which will be attached to your deposition.

It is imperative that you return the original errata sheet to the deposing attorney within thirty (30) days of receipt of the deposition transcript by you. If you fail to do so, the deposition transcript may be deemed to be accurate and may be used in court.

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E R R A T A

I wish to make the following changes, for the following reasons:

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